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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA *
*
v. * 06-CV-354-PB
* November 10, 2008
* 9:55 a.m.
GENERAL ELECTRIC COMPANY *
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TRANSCRIPT OF BENCH TRIAL - DAY FOUR
ORAL ARGUMENTS
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

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1 P R O C E E D I N G S

2 THE CLERK: Court is in session and has for
3 consideration a bench trial in United States of
4 America versus General Electric Company, civil case
5 number 06-CV-354-PB.

6 THE COURT: All right. Let's do some
7 housekeeping first. I have read everything that the
8 parties have asked me to read, although it took me
9 about ten hours to do it. And I wish that they could
10 have given me less to read, but I extend the courtesy
11 to the parties to actually read everything that they
12 send to me. So we need to make sure that everything
13 that is on that cart is included in the record and so
14 that all of the exhibits have been identified and
15 those depositions that have been -- where you have
16 made designations and asked me to read the
17 designations -- are part of the record. So what I
18 need to make sure the Clerk does is go through the
19 list of admitted exhibits with the parties after we're
20 done today and make sure that those items are all in
21 the record. Any exhibits that the parties ask me to
22 admit during the trial and that they, in fact,
23 presented to me during the trial should also be
24 admitted, and you need to have a record of that.

25 Okay. Now, there may be other exhibits that

1 the parties agreed to admit but that you didn't ask me
2 to read and didn't show to me. In my view, those
3 should be stricken and not included in the record
4 because I made clear to you that anything on which you
5 wanted me to base the decision should be presented to
6 me. And so I want to clean that up and remove
7 anything that was not shown to me from the record. So
8 those will be treated as ID exhibits that were not, in
9 fact, introduced. The Clerk needs to make that
10 distinction clear.

11 Finally, there may be some unresolved
12 objections to the admissibility of some of the
13 materials that you presented to me. Perhaps not.
14 Perhaps you've agreed that all of those things can be
15 admitted, but if there are any -- if anyone is
16 asserting that I should not base my decision on any of
17 the materials you asked me to read because some of
18 those materials are inadmissible, you should stand up
19 now, identify what it is that needs to be stricken,
20 make your argument, and I will decide whether to
21 exclude it or not. Otherwise, I'm going to treat all
22 of that as admissible, notwithstanding any objections
23 that had been previously made to it, either in the
24 final pretrial submissions or in a motion in limine or
25 anything like that, okay? So if you want anything

1 stricken from the record that you presented to me to
2 read on Friday, stand up now. Otherwise we're going
3 to include it in the record.

4 MR. FLYNN: Your Honor, as you know, we have
5 the pending motion in limine for Neil Shifrin.

6 THE COURT: I just want to be clear so
7 there's no doubt about this. There are no pending
8 motions to strike anything that you asked me to read.
9 Now is your time to orally stand up and tell me, we
10 want you to strike Shifrin's deposition in its
11 entirety and here are the reasons why. So speak now
12 and I will rule now. So if you don't speak now and if
13 you can't even remember why you objected, how do you
14 expect me to know. So tell me what you're objecting
15 to, why you're objecting to it and I will rule, and
16 otherwise I will admit, okay?

17 So what do you want to strike in the
18 materials that were given to me?

19 MR. FLYNN: The United States would like you
20 to strike the deposition testimony and the report of
21 GE's expert, Neil Shifrin.

22 THE COURT: And what's the basis for the
23 objection?

24 MR. FLYNN: Essentially -- there's a few
25 bases, but if I can summarize, the general basis is

1 pretty much what he talks about is it's not something
2 that an expert needs to testify about. It's common
3 sense. It's something that --

4 THE COURT: It's within the cannon of the
5 judge, and therefore is not properly the subject of
6 expert testimony.

7 MR. FLYNN: Correct.

8 THE COURT: All right. Anything else you
9 want to say about that?

10 MR. FLYNN: We do think he's also unqualified
11 for some of the areas that he was proffered as an
12 expert in. He's an environmental engineer who
13 testified strictly about basic transport issues, and
14 here he's testifying about the regulations governing
15 disposal, about whether it makes commercial sense for
16 Fletcher to pick up material at GE, and then he
17 ultimately testifies on the ultimate issue of the
18 case, whether the scrap Pyranol is a useful product.

19 THE COURT: Okay. I overrule your objection.

20 The Shifrin deposition will be admitted. I found it
21 to be of almost no value to me and haven't really --
22 and don't intend to rely on it in making any decisions
23 because it either says things that I already
24 understand, says things about which there are not
25 conflicts, or says things that I don't feel are

1 material to the analysis of the problem that you've
2 asked me to resolve so I don't intend to rely on it.
3 I'm going to admit it. I just don't deem it to be
4 persuasive on any point. Of course, subject to the
5 defendant making some argument to me in closing that
6 helps me understand why it is valuable to me.

7 All right. Your objection is overruled.

8 What's the next thing you want to try to move to
9 strike, if anything? Anything else?

10 MR. FLYNN: I think that's it, your Honor.

11 THE COURT: All right. Do the defendants
12 want me to strike anything -- or any portion of
13 anything that they have submitted to me to review
14 here?

15 MR. BIAGETTI: No, your Honor.

16 THE COURT: Okay. So those will all be
17 admitted then, Vinny. And I think, therefore, we have
18 the record on which we're deciding the case. The
19 record consists of the testimony of those witnesses
20 who testified live, the videotaped deposition, the
21 excerpts that were designated and played and/or read
22 by me in the deposition that was submitted to me, any
23 exhibits that were admitted during the course of the
24 witness testimony or that were admitted during
25 interludes between witness testimony where the parties

1 offered an exhibit and either did so by agreement or
2 there was objection and I ruled and admitted in whole
3 or in part the exhibit, and those materials that have
4 been submitted to me for review that I have read in
5 preparation for the closing arguments today.

6 That comprises the record on which I will --
7 the evidentiary record on which I will decide the
8 case. Everybody agree?

9 MR. FLYNN: Your Honor, I apologize. My
10 colleague just reminded me that we had one other
11 objection that we would like to bring to your
12 attention.

13 THE COURT: What is that?

14 MR. FRANKEL: Your Honor, I believe that your
15 Honor designated certain portions of the Lloyd
16 Papageorge deposition where Mr. Papageorge testifies
17 concerning a market for used Aroclor, and we objected
18 to it based partly on your Honor's own ruling. You
19 struck this evidence at the time of the summary
20 judgment proceeding on the ground that you found it
21 was based on hearsay and not based on his personal
22 knowledge. So we would raise the same objection at
23 this point.

24 THE COURT: I don't frankly remember, but are
25 you speaking about the deposition testimony that --

1 and I may be confusing the witnesses' names -- who
2 testified that it was useful as an extender or --
3 which one testified that it was useful as an extender
4 and which one testified that it was useful as a
5 plasticizer?

6 MR. FRANKEL: Well, your Honor, I believe Mr.
7 Papageorge, who was a Monsanto employee, testified
8 that he believed there was a market for used Aroclor,
9 and basically if you read the --

10 THE COURT: I didn't find any testimony about
11 the market for scrap Pyranol -- expert testimony to be
12 useful, and I'm just not going to consider it. It
13 doesn't persuade me of anything, subject to the
14 defendants telling me why it does. I found the expert
15 testimony extremely unhelpful on both sides. It was
16 useful in telling me something I already knew from
17 other witnesses, which is that there are uses of
18 Aroclors as plasticizers and there were at the time
19 but as far as it said anything else -- the only thing
20 that I could glean from the depositions from the
21 experts that was useful was something that I already
22 knew, which is when you make a batch of something
23 using an Aroclor as a plasticizer, the Aroclor
24 comprises, by volume and by cost, a very small
25 percentage of the batch of whatever it is that you're

1 producing, and therefore it is very risky to use scrap
2 Pyranol as a substitute for virgin Aroclor because if
3 there's any contaminant in there that makes the batch
4 unsuitable to save two bucks, you may lose \$2,000. So
5 that businesses don't ordinarily do that kind of thing
6 when the constituent that they're using as a
7 substitute comprises such a small part of the cost of
8 the batch they're producing. The risks are simply too
9 great. Now, I didn't need an expert for that. I
10 already knew that based on other testimony so it just
11 says something I already knew but -- that was useful,
12 but pretty much everything else was -- either I
13 already understood or it was not useful to me.

14 All right. So I overrule your objection. I
15 certainly don't mean to be inconsistent with what I
16 did in the summary judgment, but to the extent I don't
17 find it to be useful to me, it's a ruling of no
18 consequence, okay?

19 MR. FRANKEL: Okay, your Honor.

20 THE COURT: All right. Anything else? Okay.
21 So we now have identified the record. I'm ready to
22 hear closing arguments, but I want to ask the parties
23 before I do, is the government in its closing argument
24 going to have a discussion about the correct
25 interpretation of the phrase "otherwise arranged for

1 disposal", or are you done with that discussion and
2 are you going to focus solely on the facts?

3 MS. FISKE: Your Honor, we have understood
4 you to articulate a standard by which the government
5 can establish that scrap -- GE arranged for the use
6 and disposal of scrap Pyranol through its transfers to
7 the Fletcher site; meaning that the government must
8 establish by a preponderance of the evidence that GE
9 intended or had constructive intent that Fletcher's
10 would dispose of at least some of its scrap Pyranol.

11 The Court further articulated that
12 constructive intent is established if GE knew that
13 disposal was a substantial certainty at the time of
14 the transaction, and I will be presenting evidence to
15 you, your Honor, today -- or discussing the evidence
16 today in the context of that legal standard.

17 THE COURT: All right. So you're not going
18 to argue -- to the extent in the past you argued for a
19 broader standard, you preserved your right to argue
20 that, but you're not going to, in this closing
21 argument, try to advocate for that.

22 MS. FISKE: That's exactly correct.

23 THE COURT: Okay. Then before we get into
24 the closing arguments, let me just explore with you --
25 because once I get on a case I start thinking about it

1 24 hours day before I'm done with it.

2 I wanted to ask a couple of questions about
3 the government, and then if the defendant has any
4 input on this.

5 The Burlington Northern case seems to me to
6 be wrongly decided, and I'm trying to understand and
7 explain and reconcile that with my own view that if,
8 for example, there is, in fact, an arrangement for
9 disposal, that is, GE knows that spills -- GE intends
10 to dispose of the waste Pyranol and knows that spills
11 will result, that those spills do qualify as a
12 disposal, but that the spills of virgin chemicals to
13 be used in a manufacturing process would not be.
14 Because Burlington Northern suggests that those are --
15 an arrangement for disposal occurs when there is an
16 arrangement to transport a virgin hazardous substance
17 and the transporter knows that spills will result.

18 That is, I think, wrong, and I think I have
19 an understanding as to why, under the language of the
20 statute, it is wrong, but my analysis about how
21 disposal works with a waste chemical is correct, and I
22 want to just ask a couple of questions and then make a
23 statement and get your reaction to it.

24 In order for there to be an arrangement for
25 disposal, CERCLA incorporates the definition of

1 disposal that's in the -- what's the solid waste --

2 what's the name of the act?

3 MS. FISKE: RCRA, your Honor.

4 THE COURT: It's the RCRA definition of

5 disposal.

6 MS. FISKE: Solid Waste Disposal Act.

7 THE COURT: Solid Waste Disposal Act. And

8 therefore a disposal means discharge, deposit,

9 injection, dumping, spilling, leaking or placing of --

10 and this is what I want to talk to you about -- solid

11 waste or hazardous waste into or on any land or water,

12 et cetera, et cetera.

13 So an arrangement for disposal must be an
14 arrangement for discharge, et cetera, of a solid waste
15 or a hazardous waste. A hazardous waste must be a
16 solid waste by the definition. You can't have a -- it
17 can't be a hazard -- in order to be a hazardous waste,
18 you must be a solid waste. If anyone doubts that,
19 I've got the definitions. I thought I brought it down
20 here. Where's my cart? Right here. Hazardous --

21 The RCRA definition -- or excuse me. The
22 Solid Waste Disposal Act definition of hazardous waste
23 is a solid waste or combination of solid wastes
24 which -- blah, blah, blah. So it's not a hazardous
25 waste unless it's a solid waste, and the definition of

1 solid waste is garbage, refuse, sludge -- skipping
2 over some things -- or other discarded material, and
3 the regulations interpreting the Solid Waste Disposal
4 Act define a solid waste as any discarded material
5 that is not excluded. And a discarded material is any
6 material which is abandoned, recycled, considered
7 inherently waste-like, et cetera.

8 So I think there's a way -- and I don't know
9 if this has been explored -- but it seems to me that
10 an otherwise arranged for disposal of a hazardous
11 substance cannot occur unless the disposal is the
12 disposal of a solid waste, and a solid waste is an
13 abandoned or discarded material. And therefore,
14 Burlington Northern, in my view, is wrongly decided
15 because what you are arranging to transport is not a
16 solid waste. It is a hazardous substance but not a
17 solid waste. The argument that the government might
18 make that -- well, spilling makes it a solid waste,
19 but that would be an entirely circular definition
20 because spilling of a hazardous substance
21 automatically made it a solid waste -- you wouldn't
22 have the definition of disposal that requires spilling
23 of a solid waste.

24 So the way to distinguish Burlington Northern
25 -- and I think consistent with the purposes of CERCLA

1 -- is to say that an agreement to transport a chemical
2 that is to be used in the manufacturing process is an
3 agreement that does not involve an agreement for
4 disposal because the substance -- although it's a
5 hazardous substance -- is not a solid waste; and the
6 spilling of it in that process does not make it a
7 solid waste, and therefore the agreement, even if it
8 includes or contemplates a spilling, is not spilling
9 of a solid waste and therefore it's not an arrangement
10 for disposal. So Burlington Northern was wrongly
11 decided, even though it is true, in my view, that an
12 arrangement for transport of a solid waste under
13 circumstances where the arranger knows that spilling
14 will occur is an arrangement for disposal of a
15 hazardous substance.

16 Do you see that distinction? Does the
17 government see that distinction?

18 MS. FISKE: Your Honor, I would like to make
19 two points in response to that.

20 THE COURT: First, do you see that
21 distinction?

22 MS. FISKE: Yes, I see the distinction.

23 THE COURT: And it's a way to say even my --
24 how I'm applying it here is right, and you don't have
25 to agree that Burlington Northern was right in order

1 for you to reach the conclusion that I'm reaching,

2 okay? Now, what comment do you want to make?

3 MS. FISKE: Thank you, your Honor. First of

4 all in this case, as we've shown in our summary

5 judgment motion, that this material is a RCRA

6 hazardous waste because of the TCE content in the

7 material, and then the second point --

8 THE COURT: You're missing the point, okay?

9 It is not necessarily a hazardous waste simply because
10 of the TCE content. It has to be a solid waste to be
11 a hazardous waste, and a waste requires -- it's what
12 you're going to do with it. It isn't a waste unless
13 it's abandoned, discarded, recycled or blah, blah,
14 blah. There are certain chemicals that are inherently
15 waste-like, and they're defined in the regulations.

16 Now, maybe you can say that this is
17 inherently -- meets the -- the regulation talks
18 about- -- if you get into -- this isn't in the
19 statute. This is in 40 C.F.R. 261, 2(d). Inherently
20 waste-like material: "The following materials are
21 solid wastes when they are recycled in any manner.",
22 and it lists hazardous waste numbers F020, F021; under
23 certain circumstances, F022, 23, 26 and 28. Now,
24 maybe TCE is one of those wastes, is it? Is it one of
25 those substances? Is it a 21, 20, 22?

1 MS. FISKE: Yes, it is.

2 THE COURT: I'm not an expert in
3 environmental regulations. Do you know what those
4 numbers mean, FO20, FO21, FO22?

5 MS. FISKE: That's a reference to a list.

6 THE COURT: And is TCE one of those?

7 MS. FISKE: Yes.

8 THE COURT: So if it involves recycling of
9 TCE, it is a hazardous waste because it's deemed to be
10 a solid waste so, yes, but not inherently, okay?

11 Aroclor is not a solid waste unless it is to be
12 abandoned, et cetera, et cetera. TCE is not a solid
13 waste unless it is to be recycled. That's my point,
14 okay, and that's why -- because none of you have been
15 doing environmental law as long as I have. Back in
16 the early ages of environmental law was when I was an
17 environmental lawyer, and we always thought about
18 arranger liability as generator liability, but it
19 isn't and it's clear when you look at the statute that
20 it isn't. And you cite a piece of legislative history
21 that suggested that Congress wanted generator
22 liability, but the language that he used very clearly
23 draws a line between generators and arrangers for
24 disposal.

25 It might have decided -- and indeed many

1 people argued that it should have allocated costs with
2 the person that creates the substance, but they did
3 not, and if they did something different and they
4 wanted to put the concept of polluter pays --
5 identifies the polluter not as the generator but the
6 person that arranges for disposal. And the problem
7 with Burlington Northern is it gets very close to
8 saying the manufacturer of a hazardous substance is an
9 arranger for disposal because -- as almost anybody who
10 does environmental law knows -- all hazardous or
11 environmental chemicals will spill at some point, and
12 everybody knows that. You could simply say all
13 manufacturers of hazardous waste arrange for
14 the disposal -- of hazardous substances arrange for
15 the disposal of it because they know that spilling is
16 certain to result, and that's an overly expansive,
17 unrealistic definition of the arranger liability
18 standard.

19 Why is all of that important to me? Because
20 the definition that I am employing here is one that I
21 think is consistent with the overall purposes of
22 CERCLA. It does not expand liability so broadly that
23 it captures generators of waste who know that spilling
24 is going to occur. It's a narrower definition that
25 requires that there be disposal of a solid waste, and

1 that is an important limiting principle on the
2 definition that I'm using because otherwise it would
3 expand the definition in the way that Burlington
4 Northern has. In a way that I think is
5 unrealistically broad. All right? So that if
6 Burlington Northern is reversed by the Supreme Court,
7 it does not necessarily follow that the standard that
8 I'm using is incorrect because I am using a different
9 standard that I think is narrower, that I think is
10 more consistent with the purposes of CERCLA and better
11 reflects the actual language of the statute that I'm
12 required to interpret.

13 Does anybody not understand me, or does
14 anybody want to say anything about what I have said?

15 MS. FISKE: I understand, your Honor.

16 MR. BIAGETTI: I agree with what you said,
17 your Honor, and I would only add that the articulation
18 you gave us on Thursday was not only narrower but more
19 demanding than Burlington Northern.

20 Burlington Northern talked about to avoid
21 imposing arranger liability on anybody that
22 manufactured -- that in that case, they decided there
23 was necessary, immediate, inevitable spillage out of a
24 process under the arranger's control.

25 What your Honor has I think articulated to us

1 on Thursday was GE would have to know and understand
2 that not all of it would be able to be used and that
3 substantial quantities of it would have to be disposed
4 of. There's the increment of extra demand that I
5 think allows you, in your words, to avoid your huge
6 Burlington Northern problem.

7 THE COURT: It's two things. It is that --
8 it is my view that arranged for disposal complicates
9 both cases in which the objective of the arrangement
10 is disposal and cases in which the arrangement is such
11 that the arranger knows that disposal will result from
12 the arrangement. That is narrower in the sense that
13 Burlington could be interpreted to suggest that even
14 where the arranger doesn't know it, but it is in fact
15 inevitable that he's conclusively presumed to know it,
16 the government -- that's the government's kind of
17 constructive knowledge standard that I think goes one
18 step too far in defining arranger liability.

19 Second, and equally important to distinguish
20 in Burlington Northern, I think the arrangement must
21 involve the discharge, deposit, injection, dumping,
22 spilling, leaking or placing of a solid waste. And a
23 chemical that is being used in a manufacturing process
24 is not at that point a solid waste, and it does not
25 become a solid waste merely because it is spilled. A

1 waste has got to be a -- a solid waste has to be
2 discarded, abandoned, recycled or inherently
3 waste-like or a military munition identified in the
4 statute not otherwise accepted under the regulations.
5 And ordinarily if I make Aroclor -- for example, when
6 Monsanto sells Aroclor to GE, Monsanto knows when it
7 sells Aroclor to GE that GE is going to spill it.
8 They know it. It will happen. Does that mean the
9 arrangement to sell Aroclor to GE is an arrangement
10 for disposal? It is not because Aroclor is not a
11 solid waste. And so I think those are two important
12 limiting principles on my understanding of the phrase
13 "otherwise arranged for disposal" that distinguish
14 Burlington Northern and in my view cabin the
15 definition in such a way that is consistent with the
16 purposes of CERCLA, one of the principal purposes
17 being polluter pays; and as that concept has
18 developed, it is the person not that manufacturers but
19 that arranges for disposal that is identified in this
20 context as the polluter.

21 And so I am using that narrower definition,
22 and I have arrived at it by trying to be true to the
23 text of the provision that I am interpreting. Now, to
24 resolve this case I don't need to give a
25 finely-developed definition of that phrase. I think

1 I've identified it with enough specificity to permit
2 the parties to argue how the evidence supports or
3 doesn't support that definition, and I think it gives
4 me enough specificity to apply the facts to the
5 phrase, as I've identified it, in such a way as to be
6 able to decide this dispute the parties have presented
7 to me, and that's all I need to do. The appellate
8 court might be more -- need to be more specific in how
9 it applies it.

10 All right. Does anybody want to say anything
11 more about the legal standard? If not, we can turn to
12 the closing arguments on the facts.

13 MR. BIAGETTI: Just, your Honor, as to the
14 wrestling over TCE versus Pyranol. There's no
15 evidence in this record that PCBs from either source
16 were found at this site, even when the EPA arrived,
17 and no evidence on this record that there was any
18 discarding done by Fletcher of anything in any drums,
19 as opposed to a release, which is a very different
20 portion of the statute. Release includes abandonment.
21 Disposal, discard, does not.

22 THE COURT: Well, an arrangement for disposal
23 by itself does not make somebody liable for clean up
24 costs, okay, but the issues that you've just cited to
25 me may be evidence about whether there was an

1 arrangement for disposal, but they aren't dispositive
2 of the question. Because as I think we all have
3 agreed at this point, what matters is what was the
4 nature of the arrangement and what did the arranger
5 understand would be the result of the arrangement.
6 That's all I need to focus on. What actually happened
7 may have some relevance in trying to give meaning to
8 that problem, but I'm not examining here whether
9 Fletcher disposed of scrap Pyranol at the site.

10 That's not the issue because you conceded the other
11 elements of being liable here for arranger liability.

12 The only test is did GE otherwise arrange for
13 disposal of scrap Pyranol in any -- to any significant
14 degree during its arrangement with Fletcher, and on
15 that point I think there clearly was an arrangement
16 with Fletcher for the -- doing something with the
17 scrap Pyranol. I think you agree. So there was an
18 arrangement. GE otherwise arranged with Fletcher to
19 do something with the scrap Pyranol. It's a question
20 of what was the nature of the arrangement? Did GE
21 arrange for disposal of it, as I've identified that
22 term, and that's where the focus needs to be today
23 because that's the only question that I'm going to
24 resolve.

25 All right. So with that in mind, the

1 government can go ahead. Present your argument.

2 MS. FISKE: Your Honor, can we ask the focus
3 to be switched over to the U.S.?

4 THE COURT: Okay.

5 MS. FISKE: This is a case about arrangements
6 for the use and disposal of GE's hazardous waste at
7 the Fletcher's Superfund site in Milford, New
8 Hampshire.

9 GE arranged for the transfer of scrap Pyranol
10 to Fletcher that GE knew was a rare and unpredictable
11 mix of hazardous substances, including spent TCE.

12 Fletcher's never used any more than two to
13 three drums a year of this material for his own
14 manufacturing operations. The balance was transferred
15 to third parties, including a company by the name of
16 Webtex or Webster. Some of it was also disposed of by
17 Fletcher's on the site, and much of the scrap Pyranol
18 remained unused for many years from leaking drums on
19 the site.

20 At the time GE did not care whether
21 Fletcher's used any of this scrap Pyranol or disposed
22 of it all. Mr. Abbe admitted that during his video
23 deposition that GE -- he would have transferred it all
24 to him even if he knew Fletcher's was using it all as
25 a weed killer, insecticide or dust suppressant. This

1 is because scrap Pyranol was a hazardous waste
2 disposal problem for GE. GE dumped it in the Hudson
3 River, put it in landfills or gave it to people to
4 dump on the ground as a dust suppressant, defoliant or
5 insecticide. All that the corporation cared about was
6 removing it in the most economical manner possible.

7 THE COURT: Well, the most damaging statement
8 in Abbe's deposition is the following: "I don't think
9 that that was of any concern. We just hoped he was
10 able to use some of it, and the balance of it he could
11 dispose of it." That's the one sentence in Abbe's
12 deposition testimony that is the most damaging
13 statement to GE in this case. Don't you agree?

14 MS. FISKE: Yes, I do, your Honor. Most
15 importantly, not only did GE not care whether
16 Fletcher's used or disposed of it, but GE knew or
17 intended that hundreds of drums would be disposed of
18 by Fletcher's. The United States asks this Court to
19 find GE liable for the cost of cleaning up the
20 hazardous substances found in the scrap Pyranol at the
21 Fletcher's site.

22 As you indicated earlier, the only discussion
23 before you today is whether GE's transfer of the scrap
24 Pyranol to Fletcher's constituted an arrangement for
25 the disposal of hazardous substances within the

1 meaning of section 10783, as you have defined the
2 issue, and for purposes of today the United States
3 will be discussing the evidence to show that by a
4 preponderance of the evidence, the United States
5 easily meets the standard that you have articulated.

6 In terms of the framework for my argument
7 today, my presentation will start with the discussion
8 of the nature of scrap Pyranol itself. Second, I will
9 review a chronology of the shipment from GE to
10 Fletcher's and what happened to the material at the
11 site. And then finally, I'll turn to a discussion of
12 the evidence that shows by a preponderance that GE
13 intended or had knowledge that disposal was a certain
14 result of its arrangements for some of the material.

15 In terms of the scrap Pyranol, the reason I
16 start with the discussion of that is because you can't
17 even meaningfully discuss the chronology and the
18 transfers without a foundation and an understanding of
19 what scrap Pyranol was. In addition, your Honor has
20 noted that what GE knew about the nature of scrap
21 Pyranol has a direct bearing on the credibility of
22 GE's claims that it believed at the time that all of
23 it would be used by Mr. Fletcher.

24 THE COURT: To me one of the key questions
25 is: What did GE know was in the drums? There are

1 several questions that I think you need to ask
2 yourself to try to resolve this. What was the
3 arrangement with Fletcher? That is, what were its
4 terms? What did the parties understand the
5 arrangement to contemplate? That's one question you
6 need to answer.

7 A second central question is: What was in
8 the drums? Because GE knew what was in the drums. So
9 what was in the drums?

10 A third question you need to ask yourself is:
11 What did GE know about Fletcher?

12 A fourth question you need to ask yourself
13 is: What did GE know about the potential uses for
14 scrap Pyranol? And so what did GE, itself, do with
15 scrap Pyranol that did not go to Fletcher and what did
16 it understand it was -- were potential uses for scrap
17 Pyranol?

18 Those questions, to me, seem to be the
19 central questions that one needs to ask in order to be
20 able to answer the question: Was this an arrangement
21 for disposal? That's how I ordered my analysis as I'm
22 thinking through the problem.

23 MS. FISKE: Exactly, and I'll turn to
24 answering your question: What did GE know about what
25 was in the drums? That's one of the questions that

1 you've asked. Scrap Pyranol represented a large
2 volume of waste generated by GE. The United States
3 acknowledges that some of the drums were pure --
4 virtually pure PCBs. Mr. Hooper has described that
5 material as being relatively thick, almost like
6 molasses.

7 THE COURT: Reading the depositions, here's
8 what I understand. There were some occasions where
9 Pyranol would be -- where they would attempt to refine
10 Pyranol from Aroclor, and for whatever reason they
11 couldn't get it to the standard that they wanted and
12 they would have to scrap the batch.

13 In those cases the result would be a
14 relatively pure Pyranol that simply didn't meet the
15 standards, and when a batch like that has to be
16 scrapped and drummed, there may be a number of drums
17 that are Aroclor -- something relatively close to
18 Aroclor or relatively close to Pyranol with a
19 relatively small number of contaminants in it. Do you
20 agree with that?

21 MS. FISKE: I do, your Honor.

22 THE COURT: So there were occasions where
23 they couldn't get a batch to meet standard. In that
24 case it hasn't fallen on the floor. It hasn't mixed
25 with TCE, mineral oil and that kind of stuff. It

1 hadn't gotten a lot of metal in it. It simply did not
2 get to the standard they want. They tried. They
3 processed it with the fuller's earth. They can't get
4 it up to spec and they decide to declare it scrap.
5 That would be the kind of drums that would contain
6 stuff that would be pretty close to Aroclor without a
7 lot of other junk in it.

8 MS. FISKE: Exactly. There's a possibility
9 in that scenario that it might have been put in a
10 secondhand or used drum that also contained a material
11 of a different sort but I --

12 THE COURT: Sometimes, yes, but if there were
13 a whole batch, they're going to have more than 55
14 gallons of it. So you're going to have to fill
15 multiple barrels with it in order to get rid of the
16 batch. Sometimes they put the batch into the river
17 but sometimes they drum it, and I think it's fair to
18 say that that would happen.

19 MS. FISKE: I absolutely agree with that.

20 THE COURT: Although -- let me ask you this.
21 I also understood that there was a scrap Pyranol tank
22 that was sometimes used, and that that would
23 accumulate over time with Pyranol from a variety of
24 sources. What can you tell me about that?

25 MS. FISKE: I agree with that also, your

1 Honor, and I think that tank may have also included
2 sometimes mineral oil, which was another dielectric
3 fluid that was sometimes in capacitors. Sometimes
4 that material could get mixed into that scrap Pyranol
5 tank or possibly TCE used to clean out the tanks might
6 also become mixed with that, and that would be a
7 scenario where you might have a case where Fletcher's
8 chemist -- you heard Mr. Hooper testify that the
9 chemist would open the drum and couldn't even decipher
10 what was in there because there was so little PCB.
11 That material might have come from a scrap Pyranol
12 tank or come from other sources.

13 THE COURT: All right. I think there is
14 evidence to suggest that at least some of the Pyranol
15 was contaminated in a way that made it unusable as a
16 dielectric for GE but did not include large quantities
17 of other contaminants, such as mineral oil, TCE, dirt,
18 other -- water -- other matters that would
19 contaminate.

20 MS. FISKE: I agree with that also, your
21 Honor.

22 In terms of quantities, there was testimony
23 that some of the drums contained as much as 22 percent
24 TCE, and that was demonstrated by Monsanto's testing.
25 You heard Mr. Hooper also --

1 THE COURT: Let's be clear about this.

2 Everybody knows this, but just for the record, TCE was
3 a commonly used degreaser that was used to clean parts
4 that had been exposed to other kinds of substances
5 during the manufacturing process, and TCE was used
6 extensively in this process to clean the capacitors
7 after they had been infused with Pyranol, and TCE was
8 used in such a way that it would result in being --
9 getting into drip pans, spilling Pyranol with TCE in
10 it, and I think significantly GE did use TCE
11 distillers that took TCE that had been mixed with
12 Pyranol and distilled off TCE, leaving a residue which
13 had to be cleaned out periodically from the TCE
14 distillers that was largely a sludge of Pyranol and
15 whatever other chemicals were in there and whatever
16 TCE didn't get fully recycled. And so it was vitally
17 important to GE's manufacturing process that there be
18 no TCE in the dielectric fluid that was used in the
19 capacitors so any Pyranol with TCE in it would have to
20 be discarded.

21 MS. FISKE: Exactly, your Honor.

22 You also heard testimony through deposition
23 transcript of a GE employee --

24 THE COURT: Can you tell me about -- I read
25 about -- and I'm not sure I fully understand this, but

1 in addition to the use of Pyranol to infuse
2 capacitors, they talked about -- in one deposition --
3 about it being used as a pump fluid. Can you tell me
4 about that, it being used as pump oil? It almost
5 sounded like it was in the hydraulic pump that was
6 used during the manufacturing process, and that that
7 would periodically have to drained and cleaned, as is
8 always the case with those kinds of pumping fluids.
9 Do you agree that Pyranol was used for that purpose?

10 MS. FISKE: Your assumption on that is the
11 same as mine. Monsanto sold Aroclors as hydraulic
12 fluids, and I assume, as you have, that it was used in
13 pumps.

14 THE COURT: Well, I'm not assuming. There
15 was testimony in one of the depositions from a GE
16 employee who talked about it being used in the pumping
17 process. So that would be another area in which you
18 would have contaminated Pyranol that is not Pyranol
19 that's used in the infusing or impregnating process
20 but is actually used as a hydraulic-type fluid.

21 MS. FISKE: Exactly, and that is material
22 that was also scrapped and labeled scrap Pyranol on
23 it.

24 THE COURT: Okay.

25 MS. FISKE: You also heard testimony from GE

1 employee Stanley Huchro that some of the drums of
2 scrap Pyranol contained as little as 25 to 30 percent
3 PCBs. As Mr. Hooper testified, you only had to shake
4 the drum to tell that some of them were thin and some
5 of them were extremely thick, and as I mentioned
6 earlier --

7 THE COURT: What do you understand Hooper to
8 mean when he talks about thin and thick? Are you
9 talking about viscosity or specific gravity?

10 MS. FISKE: I think, as you indicated
11 earlier, the witnesses used thin and thick sometimes
12 as a proxy for specific gravity. They are two
13 different concepts.

14 THE COURT: See, I think they use thin and
15 thick to refer to differing viscosity and that they
16 used a hydrometer to measure specific gravity, but
17 when they talk about thin and thick Pyranol, they're
18 talking about things with differing viscosity
19 because -- I don't know if you know -- TCE is a
20 substance with very low viscosity. Aroclor is
21 something, according to the testimony -- I've never
22 seen it -- but that has a heavier viscosity and that's
23 what -- I understood Hooper to be talking about
24 differences in viscosity when he talks about thick or
25 thin because he would talk about heavy or light if he

1 were talking about specific gravity.

2 MS. FISKE: I agree with you, your Honor.

3 THE COURT: Okay.

4 MS. FISKE: We've been discussing the various

5 types of material that could be found in a drum of

6 scrap Pyranol, but there's no evidence in the record

7 that GE made any effort to distinguish between grades

8 of scrap Pyranol. It was all treated the same.

9 Without distinction, some of it was sent to landfills,

10 some was dumped into the Hudson, some was sent to

11 municipalities for use as dust suppressants, and as we

12 know, some of it was transferred to Fletcher's.

13 THE COURT: There's some hint in the record

14 that at various times GE explored the possibility of

15 sending Pyranol back to Monsanto to see if it could be

16 reclaimed. What can you tell me about that?

17 MS. FISKE: I believe, your Honor, that some

18 of it was, in fact, sent back to Monsanto to be

19 reclaimed, and it was the higher quality material that

20 was sent back -- the type of material that we talked

21 about initially.

22 THE COURT: Isn't that an effort at sorting

23 then that you say never occurred?

24 MS. FISKE: Okay. That's a fair point. I

25 should say with respect to the material that was

1 transferred to Fletcher's, there was no effort to
2 distinguish between the types of material --

3 THE COURT: I thought the Monsanto effort was
4 ultimately deemed unproductive because the cost of
5 trying to recycle it was greater than the potential
6 benefit to Monsanto so it didn't end up doing that to
7 any substantial degree. Have I got that wrong?

8 MS. FISKE: I would agree with that and there
9 were -- yes, I think you have that right.

10 THE COURT: All right.

11 MS. FISKE: The commonly understood use for
12 scrap Pyranol at the time was to apply it to the
13 ground as a dust suppressant, weed killer or
14 insecticide. Several GE employees knew it was being
15 used for that purpose, including Mr. Abbe. GE
16 employees also knew there was no market for the
17 material and that except for Fletcher's, no one wanted
18 it; with a possible exception for use as a dust
19 suppressant.

20 THE COURT: There was testimony that it was
21 used in road oiling -- in effect, dirt road oiling by
22 communities, but that is an arrangement for disposal.
23 Under the statute, road oiling is clearly an
24 arrangement for disposal. And so the only
25 transactions that I can see that GE engaged in with

1 Pyranol that did not involve -- potentially did not
2 involve disposal was Fletcher. Everything else that
3 they did with Pyranol was arrangement for disposal,
4 and so leaving arguable whether its transactions with
5 Fletcher were different or whether they were like all
6 of the other arrangements which GE had for scrap
7 Pyranol, which were arrangements for disposal.

8 MS. FISKE: Exactly, your Honor, and we do
9 acknowledge that Fletcher's used a small amount of
10 scrap Pyranol in a specific type of paint that
11 Fletcher's made.

12 THE COURT: And there is evidence in the
13 record that GE understood that Fletcher had a use for
14 it that involved its use as a plasticizer in certain
15 kinds of paints. I think there's evidence to suggest
16 that Clark knew that, Abbe knew that, others knew
17 that.

18 MS. FISKE: I don't think Mr. Clark had ever
19 heard the term plasticizer before, but we'll get to
20 discussion of that.

21 THE COURT: Okay. I may have that wrong.

22 MS. FISKE: Our paint expert, Richard Benito,
23 who was in the paint industry for over 45 years,
24 thought it would be disastrous to add scrap Pyranol to
25 paint. The reason for this is because of the

1 inconsistent and variable nature of scrap Pyranol. It
2 wasn't that one drum of it might theoretically be able
3 to be added to paint if it was all the same, but
4 because of the incredible varying nature, it was like
5 a Russian roulette, what --

6 THE COURT: Well, but the important point is
7 how risky is it depends upon what's the potential
8 savings per batch to substitute. And because it
9 comprises less than 5 percent of the batch, the
10 difference in cost versus the cost of the entire batch
11 is such that it would render the transaction highly
12 risky from an economic perspective.

13 If you were going to use 95 percent Aroclor
14 in the application and you substituted 95 percent
15 scrap Pyranol, you might be much more willing to take
16 a risk because if you could save -- since scrap
17 Pyranol was sold to Fletcher at less than 1/50th of
18 the cost of Aroclor, if you could use it as a
19 substitute -- and even if you had to throw out ten
20 batches to get one good batch, it might still be
21 economically viable, but because its use as a
22 plasticizer comprises such a small percentage of the
23 total cost of the batch, it is truly a kind of Russian
24 roulette to put it in there. Because if you lose one
25 batch, you have to gain a huge savings on all of the

1 other batches to make up for the cost. That's the
2 problem.

3 MS. FISKE: That's exactly right, your Honor,
4 and that's probably why -- even though GE was making
5 coatings at the same time in Schenectady, New York
6 that included Aroclors as an ingredient, it's probably
7 why GE never tried to use scrap Pyranol in any of
8 its --

9 THE COURT: You can draw inferences from
10 several different things. That GE never used it.
11 That GE never found a person willing to use it or
12 another person never approached GE who was willing to
13 use it, and that the amount that Fletcher paid was so
14 low relative to the cost. All of those things suggest
15 that what your expert says is likely to be true and
16 you could argue would be understood to be true by GE
17 at the time it was engaging in the relationship
18 because these were all things that were known to GE.

19 GE knew it wasn't using it in its paint
20 operations. GE knew no other customer had come
21 forward willing to buy scrap Pyranol. GE knew what it
22 was charging Fletcher for the scrap Pyranol. GE knew
23 what Aroclor cost GE. All of those things are
24 knowable to the people at GE who are interested in
25 making a profit and are able to process that

1 information in a reasonable economic way. So those
2 are the arguments I think you would draw from what GE
3 knew and knew all of those things, and I think that's
4 the way you try to make that argument about what GE's
5 position was at the time.

6 MS. FISKE: I agree with that, your Honor.
7 In addition, from a layman's perspective, it defies
8 common sense that all this scrap Pyranol could be
9 added to paint. Some of it was thick. Some of it was
10 thin. Some of it was black specks. Some of it was
11 amber. Some of it had cigarette butts. It may be
12 possible to imagine adding nearly pure Pyranol to
13 paint but not the mix that was being sent to
14 Fletcher's, and even Mr. Abbe agreed --

15 THE COURT: Your expert doesn't say that -- I
16 didn't read your expert to say that TCE, itself, was
17 incompatible with a paint usage. What I understood
18 him to be saying was unless you know how much TCE is
19 in there, you can't get the formula right because TCE
20 might substitute for another solvent that you're
21 using -- a hydrocarbon solvent you're using, but
22 unless you know how much is in there, the adjustment
23 of your paint formula is not going to be right and you
24 run the risk of it being too thin if there's too much
25 TCE in a given batch.

1 MS. FISKE: That's exactly right, your Honor,
2 but Mr. Abbe, himself, admitted that he was curious at
3 the time how such a small paint company could have
4 been using these large quantities of scrap Pyranol to
5 make paint and thought they would have wanted it to be
6 clean, and I interpret that to mean, you know, a
7 consistent material.

8 But with that background on scrap Pyranol, I
9 would like to now turn to a timeline that we prepared
10 for you marking out the chronology of the shipments of
11 scrap Pyranol to Fletcher's. That's Exhibit 78.

12 THE COURT: What do you need? You're not
13 seeing it on your screen?

14 MS. FISKE: I wasn't, but it's on now, your
15 Honor.

16 THE COURT: Okay.

17 MS. FISKE: The timeline is helpful to
18 demonstrate that at certain points during the
19 GE/Fletcher's relationship there was no question that
20 GE knew or intended that Fletcher's dispose of some of
21 the scrap Pyranol that GE did not want and that
22 Fletcher's could not use or did not want.

23 Starting at the beginning you heard Mr.
24 Hooper testify that in 1953 free loads of scrap
25 Pyranol arrived at the Fletcher's Milford site from

1 GE. You heard Mr. --

2 THE COURT: Couldn't that just be a product
3 sample? A company that wants to sell a chemical to a
4 company to be used saying, here, let me give some of
5 this to you for free and see if you like it.

6 MS. FISKE: Exactly, and if that was the
7 beginning and the end of the relationship and those
8 were the only drums that Fletcher's ever received, we
9 might not be here today, but that's how the
10 relationship started.

11 You heard Mr. Fletcher's son explain that Mr.
12 Fletcher was a junk dealer. He liked to trade in
13 chemicals, and his son even referred to him as a
14 chemical junky.

15 You heard Mr. Hooper testify that he didn't
16 think that Mr. Fletcher bought that material to use to
17 make paint but that he wanted to make a dime on it.

18 So during the intervening years from '53 to
19 '56 Mr. Fletcher starts looking for a customer who
20 might be interested in buying this material from him,
21 and ultimately Mr. Fletcher does find Webtex as a
22 customer.

23 THE COURT: I think GE could make a little
24 more from Hooper's testimony than that. I gathered
25 that even before he found Webtex he was getting rid of

1 some of the Pyranol. He talked about some of it being
2 shipped even before the Webtex relationship, implying
3 that there might be other customers. I don't think we
4 can rule that out from the Hooper testimony.

5 MS. FISKE: I agree with that. There is
6 testimony to that effect.

7 In 1956 Fletcher starts taking its first
8 trips to GE to pick up scrap Pyranol from the Hudson
9 Falls and Fort Edwards facilities. When Mr. Hooper
10 first goes there, he meets a man named Mr. Metevier
11 who is in charge of the scrap salvage yard. During
12 the course of his relationship with Mr. Metevier,
13 Webster complains about the quality of the scrap
14 Pyranol, that it's too thin and junky. These
15 complaints are conveyed to Mr. Fletcher, who agrees --
16 these complaints are conveyed to Mr. Metevier who
17 agrees that to compensate for the poor, junky, scrap
18 Pyranol he's going to give more of the same scrap
19 Pyranol to Fletcher's, and that was an acceptable
20 arrangement at that time between Fletcher's and GE --

21 THE COURT: The key fact you're omitting is
22 that none of it would be returned to GE so that if
23 Fletcher is saying, it's too thin, I can't use it, and
24 they say, okay, we'll compensate by giving you some
25 free loads and it isn't returned, what inference does

1 GE draw from what communications it had with Fletcher
2 about things that could not be used? Now, I think
3 GE's argument would be, well, there's testimony about
4 mixing and that he could mix it together and still get
5 it to a sufficient quantity. That's one possible
6 interpretation, and another is even if he understood
7 that these -- this scrap Pyranol was not all of
8 sufficient quantity to be usable by Fletcher --

9 MS. FISKE: We favor the latter
10 interpretation and inference.

11 THE COURT: I thought you would.

12 MS. FISKE: Somewhere in the 1963-1964 time
13 period Mr. Varnum succeeds Mr. Metevier as foreman of
14 the scrap and salvage yard. During this era Mr.
15 Varnum no longer agrees to give free loads of scrap
16 Pyranol to Mr. Fletcher to compensate for the poor
17 quality. As a result, Mr. Fletcher instructs his
18 drivers to come to the site prepared with a hydrometer
19 to test the drums to make sure they achieve a specific
20 gravity that's desirable to Webster.

21 THE COURT: Have you figured out -- I'm still
22 baffled by the specific gravity analysis because if
23 thin meant light and TCE were the principal
24 contaminant in many of the drums, according to the
25 testimony I saw, TCE has a higher specific gravity

1 than Pyranol. It's thinner, less viscous, but has a
2 higher specific gravity. So I don't know how you can
3 tell anything meaningful about -- through a hydrometer
4 analysis if the problem is to avoid contaminants.

5 MS. FISKE: Mineral oil and pump oil I
6 believe --

7 THE COURT: Do have lower gravities.

8 MS. FISKE: And water.

9 THE COURT: As does water, obviously, but I
10 really never really understood how the hydrometer
11 really --

12 MS. FISKE: I agree with your Honor that it's
13 somewhat of a puzzle, and I was surprised when I first
14 observed that TCE was heavier than water, but I think
15 in the context -- the really important thing is that
16 GE observes that some drums are being rejected and
17 that that's what really matters. That they see the
18 drums being tested.

19 THE COURT: That's a good point. Okay. So
20 during that period there was rejection. You argue
21 during the following period there was sending --
22 uncritical sending of samples that resulted in the
23 complaint so GE knew that certain of the drums would
24 not meet Mr. Fletcher's standards but sent them to him
25 anyway.

1 MS. FISKE: That's exactly right, your Honor,
2 and we'll move to the final time period. In 1956 Mr.
3 Varnum retires. Hooper has no recollection of going
4 back to the site after Mr. Varnum has retired.

5 In 1968 Mr. Fletcher writes a letter to GE,
6 that's Exhibit 5, and during this time period he
7 explains that a contract truck has been picking up
8 material. There's no Fletcher's employee at the GE
9 site to supervise what type of material is put on the
10 truck and, as a result, GE takes the opportunity to
11 indiscriminately load -- and as Mr. Fletcher refers to
12 it as -- everything in God's green earth onto the
13 truck and he complains that the material that he's
14 gotten is badly contaminated.

15 THE COURT: Your view is that "your man" --
16 Fletcher got it wrong. It's Fletcher's man hired as
17 an independent rather than GE.

18 MS. FISKE: My view is that "your man" is a
19 GE scrap and salvage employee who is indiscriminately
20 loading material onto a contract truck --

21 THE COURT: Put that excerpt back up. Oh,
22 okay. Is this from the same letter?

23 MS. FISKE: Yes, it is, your Honor.

24 THE COURT: So this is the explanation of the
25 "your man" question I raised during the question?

1 MS. FISKE: Yes.

2 THE COURT: And as I understand those two
3 pieces together, your position is that Fletcher stops
4 sending his own men. Fletcher arranges for a
5 contractor to take it. Fletcher's contractor got out
6 of business. GE arranged for a contractor to haul the
7 stuff and "your man" references to Fletcher talking
8 about your contractor who brought the stuff.

9 MS. FISKE: Right. Either your contractor or
10 your people in the scrap and salvage area. Either
11 one. There's no Fletcher's representative at the GE
12 plants to supervise and test what's going on the
13 trucks.

14 THE COURT: But your man has been hauling
15 refers to the hauler, not the man on the loading dock.

16 MS. FISKE: That's correct.

17 THE COURT: So I think the sensible way to
18 put that together is to say that the chronology was
19 after Fletcher stops sending his own trucker -- he
20 originally had a contract trucker. That contract
21 trucker went out of business. GE found another
22 contract trucker for him and started sending stuff,
23 and it was during this period of contract truckers
24 that Fletcher was getting what he decided was
25 insufficient quality Pyranol and he's blaming GE

1 because the men at the loading dock would use that
2 opportunity to foist on them all of the scrap Pyranol
3 they had when they knew, because of rejections during
4 the Varnum era, that only certain Pyranol would be
5 useful to Fletcher.

6 MS. FISKE: That is exactly right, your
7 Honor. You heard a -- well, let's now look at the
8 Abbe/Clark memo, which is Exhibit 7. So this letter
9 comes in and you have Mr. Abbe -- I'm sorry, Mr. Clark
10 authoring a memo analyzing this issue and determining
11 that Mr. Fletcher has a valid claim and it's cited
12 that some of the material contains up to 22 percent
13 TCE and water.

14 THE COURT: It's your position that the
15 material that was sampled is scrap Pyranol from the GE
16 scrap Pyranol area, not materials that were actually
17 in Fletcher's possession.

18 MS. FISKE: That's correct, but it's
19 analogous material -- is what I would argue.

20 THE COURT: Okay.

21 MS. FISKE: And Mr. Abbe and Mr. Clark
22 discuss this problem and agree -- and from Mr. Abbe's
23 deposition you read not only do they find that
24 Fletcher's had a valid claim and didn't see any reason
25 to dispute any aspect of the letter, but also -- can I

1 see slide one, the quote that you read to me before --
2 they decide that they'll just give him all of the
3 material for free because we hoped he was able to use
4 some of it, and the balance of it he could dispose of
5 it, and that's how the relationship ends, with GE just
6 giving Fletcher's 1,800 drums, many of which he
7 doesn't want and cannot use, and they're transferring
8 the responsibility for disposing it to him, even
9 though in that letter he requests, please, can I pay
10 for this material to come back to you? I want you to
11 pay the return freight and then I'll pay you for the
12 good stuff that I want, and GE says, no, that's not
13 worth the hassle for us. You just keep it all. It's
14 your problem to figure out how to dispose of it, and
15 by that way, as the Clark and Abbe memo memorializes,
16 GE has avoided the cost of its own disposal of this
17 material and put it onto Fletcher's.

18 In terms of wrapping up the chronology of
19 what actually happened at the Fletcher site to the
20 remainder of this material, for many years after
21 1968 -- I should say he loses Webster as a customer
22 sometime in '68, and then from the time period we
23 heard Mr. Hooper testify -- from '68 to sometime in
24 the '80s, when Mr. Kamieniki removes the material,
25 there's no significant customer from Mr. Fletcher for

1 this material; and maybe a few people take it to
2 remove it for dust suppressant, but the majority of it
3 remains on the site.

4 THE COURT: Well, Fletcher's son says they
5 also used some of it as a dust suppressant at the
6 site.

7 MS. FISKE: Yes. Exactly. To describe that
8 a little more graphically, they would punch a hole in
9 this 55 gallon drum, load it on a forklift and drive
10 it around the site during the summer months to
11 suppress the dust in the yard.

12 We also heard testimony -- there's a
13 stipulation on this -- that during the filter blending
14 process scrap Pyranol spilled on the ground, and of
15 course some of it also spilled on the ground when the
16 trucks were washed out.

17 By 1978 TSCA banned the use of PCBs in
18 anything other than a totally enclosed application,
19 such as a capacitor. So after that scrap Pyranol had
20 no known legal use.

21 From the day that Fletcher's first received
22 the scrap Pyranol in '53 until 1978, he never used any
23 more than two or three drums of it a year in his own
24 paint manufacturing process, and even then he could
25 only use the thicker, higher quality Pyranol.

1 So now that we've discussed the chronology, I
2 want to turn back to some of the evidence that we
3 believe supports a finding under your legal standard
4 that you've articulated; that GE arranged for the use
5 and disposal of some of this scrap Pyranol at the
6 Fletcher's paint site.

7 Throughout these proceedings your Honor has
8 expressed interest in the evidence that shows what GE
9 knew or intended with respect to this scrap Pyranol
10 that would be disposed of by Fletcher's; and with that
11 question in mind, there are two areas to explore, the
12 first is GE's actions, and in a case like this what GE
13 actually does with the material is more probative than
14 after the fact characterization. Here you're going to
15 see actions speaking louder than words.

16 The second area to explore is not just what
17 GE did but what GE said it thought at the time and
18 what it knew at the time, but let's start with the
19 first category, action. What did GE actually do with
20 the material? You've seen this chart before. It's
21 Exhibit 69.

22 THE COURT: Can I ask you, for the benefit of
23 my court reporter, how much longer do you think you're
24 going to be?

25 MS. FISKE: Ten minutes.

1 THE COURT: Okay. We'll go until you finish
2 and then take a break.

3 MS. FISKE: What did GE actually do with this
4 material? Some of it was discharged to the Hudson
5 River, some discarded into various landfills; and this
6 was all during the same time period that the material
7 is being transferred to Fletcher's. It was also
8 transferred to municipalities for use as a dust
9 suppressant and given to employees for use as a weed
10 killer and removed by scavengers for out of sight, out
11 of mind disposal.

12 Also important in a case like this is the
13 absence of action. It's also a compelling indicator
14 of what GE really thought about this material. GE
15 claims that it was selling this as a useful commercial
16 product, but GE never undertook even the most
17 rudimentary QA/QC on the material, such as seeking out
18 floor sweeping. GE never distributed scrap Pyranol
19 from anyplace other than the scrap yard. GE did not
20 place scrap Pyranol in clean, new drums or give it a
21 catchy name like plasticizer Pyranol. At the time no
22 one at GE ever called it anything except scrap or
23 waste Pyranol.

24 THE COURT: Well, I don't think there's any
25 dispute here that GE considered scrap Pyranol to be a

1 waste. It did not conceive of scrap Pyranol as being
2 a means by which GE could turn a profit through the
3 sale of it. That it was able to generate very small
4 amounts of income through the sale of Pyranol to
5 Fletcher was virtually incidental. Everyone concedes
6 that GE's objective was to be rid of the Pyranol, not
7 to make money through the sale of it. It simply
8 wouldn't have taken the time to filter it, label it,
9 market it, because it didn't see the scrap Pyranol as
10 being a line of products for GE. It was a nuisance to
11 be gotten rid of, and I don't think there's any
12 dispute about that.

13 MS. FISKE: That's exactly right, and the
14 same with respect to the warnings that were provided
15 to certain products, such as capacitors and
16 transformers, but not on the drums of scrap Pyranol
17 that were transferred to Fletcher's. So you've come
18 to the exact same conclusion that I was advocating
19 with respect to what GE wasn't doing.

20 Turning to the comment you made about how GE
21 didn't see this as a product with any economic
22 value --

23 THE COURT: It was able to make some money
24 from selling it, but it wasn't something that was a
25 line of business that GE was interested in being in

1 because it couldn't make any kind of profit that
2 mattered from it. It was an economical way to be rid
3 of what it saw as a waste product; but at the same
4 time it is -- I think the only way to interpret the
5 evidence is to attribute to GE an understanding that
6 at least some of it would be used by Fletcher in a way
7 that justified Fletcher paying for it, and I think
8 there's that evidence and there's evidence that at
9 least some GE employees understood that he was using
10 it as a plasticizer in paint.

11 MS. FISKE: If I may, I would like to direct
12 your attention to the price that GE was charging for
13 scrap Pyranol. GE claims that this material was
14 valuable because Fletcher's was willing to pay for it
15 and let's -- I would like to just focus on that for a
16 minute. When GE didn't simply give it to Fletcher's,
17 GE charged approximately 4 cents per gallon of scrap
18 Pyranol, and that's discounting for the value of the
19 drums that it came in. That price that Fletcher's
20 paid per --

21 THE COURT: So you're assuming a drum is
22 worth a buck twenty-five?

23 MS. FISKE: Correct.

24 THE COURT: Okay. So if we assume that, you
25 would get per gallon cost of scrap Pyranol is four

1 cents versus three dollars for virgin Aroclor.

2 MS. FISKE: Exactly, but even that is an
3 overstatement of the economic value of scrap Pyranol.

4 Can I see Exhibit 79, please? This exhibit
5 is based on the Siebel affidavit where she summarizes
6 and reconciles GE's accounts of the volume of scrap
7 Pyranol that's sent to the Fletcher's site.

8 The free initial shipment is not included on
9 her affidavit, nor is the free shipments given by
10 Metevier, but the material from '66 to '67 that's
11 ultimately given to Fletcher's for free, that volume
12 is reflected in her affidavit and it's pretty stark.

13 THE COURT: Where are you getting the number
14 for the free initial shipment and the --

15 MS. FISKE: Those are based on -- the number
16 for the free initial shipment is based on a
17 conservative estimate that Mr. --

18 THE COURT: Hooper's number of barrels that
19 came in?

20 MS. FISKE: Yes.

21 THE COURT: What's the Metevier adjustment?
22 What's the basis for that number?

23 MS. FISKE: You will notice that I shaded
24 that slightly different because it is just based on
25 witness testimony and -- this actually comes out of

1 EPA's determination where estimates were based on
2 volumes for a past year compared to the years when
3 Metevier was giving it for free, but it's not really
4 significant. The real thing that you can focus on
5 here where it's uncontroverted, based on GE's own
6 30(b)(6) affidavit, are the two columns that I've
7 noted where it's documented by GE's own ledgers, and
8 you can see that roughly half -- maybe slightly more
9 than half of the material was simply given to
10 Fletcher's for free.

11 THE COURT: Okay.

12 MS. FISKE: The final two years of the
13 relationship are the most significant. By 1965
14 Fletcher's was on a list of cash in advance only
15 customers. He was supposed to pay cash in advance,
16 but for two years he obtained scrap Pyranol for no
17 payment at all. This was extremely unusual to have an
18 accounts receivable spread out for such a long period
19 of time, especially for a cash in advance person --

20 THE COURT: Again, I don't think there's
21 going to be any dispute about this. GE was
22 accumulating scrap Pyranol, needed to get rid of it
23 and was glad to have Fletcher take it off its hands.
24 Certainly it wanted to get any money Fletcher could
25 pay for it, but its principal goal was to get that

1 stuff out of there; and if it could get it out of
2 there without cost, it's ahead of the game when
3 compared to the cost it would have to incur to have
4 somebody haul it out of there. So that's what I -- I
5 don't think there's going to be any real dispute about
6 that.

7 MS. FISKE: And GE was pleased to simply give
8 the scrap Pyranol to Fletcher's for free because it
9 meant GE didn't have to pay for its disposal.

10 Now I would like to turn to another area to
11 explore, which is what did GE know at the time and
12 what did they say at the time? Perhaps the most
13 single important factor of the whole case is what GE
14 knew about the nature of scrap Pyranol itself -- the
15 varying nature of the mixture of hazardous substances
16 that it was transferring to Fletcher's. Some of it
17 could have been relatively pure, but some of it could
18 not be used to make paint.

19 GE knew it made no effort to distinguish
20 between quality and scrap Pyranol. It gave it all
21 indiscriminately, especially during the last contract
22 truck years. It was all indiscriminately loaded on
23 the trucks and sent to Fletcher's. This fact has
24 direct relevance on the credibility of GE's claims
25 that GE intended or knew that all of it was being used

1 by Fletcher's.

2 Both Mr. Clark and Mr. Abbe admit that they
3 thought Fletcher's was a small paint manufacturing
4 company. Mr. Hooper testified it had four or five
5 full-time employees, maybe more during the summer
6 part-time. Not one senior level GE employee ever
7 asked Fletcher what he was doing with the material.
8 Moreover, even if Mr. Fletcher had answered, oh, I
9 pour some of it on the ground to keep down the dust in
10 the summer, GE would have continued to have given it
11 to him.

12 Mr. Abbe testified that he didn't care if
13 Fletcher's was using some of it as a dust suppressant,
14 insecticide or weed killer. In his own words, he
15 didn't care what it was being used for, and I quote
16 again from the excerpt that you read earlier, "We just
17 hoped he was able to use some of it, and the balance
18 of it he could dispose of it.".

19 THE COURT: You keep suggesting that GE
20 employees knew that Fletcher was using it as a dust
21 suppressant and/or insecticide or herbicide. I know
22 there was an Abbe statement in a deposition that was
23 later disavowed by Abbe that still is in one of the
24 exhibits that was admitted, the summary that --
25 prepared by and testified about in the Siebel

1 affidavit, but other than that, is there any actual GE
2 testimony from any employee that said, we knew he was
3 using it for that purpose?

4 MS. FISKE: No, your Honor.

5 THE COURT: Okay.

6 MS. FISKE: But Mr. Abbe's description during
7 his deposition and the Abbe/Clark memo make explicit
8 what has been implicit in the relationship between GE
9 and Fletcher's all along, which is that GE would
10 transfer scrap Pyranol to Fletcher's with the fortuity
11 that maybe he could use some of it to make paint,
12 which he didn't really care, and with the
13 understanding that much of it would not be able to be
14 used by Mr. Fletcher.

15 This corporate attitude is best summarized in
16 GE's own words, turning to Exhibit 9. Here is a 1970
17 survey explaining GE's past disposal practices, and
18 here GE explains that much of the material has been
19 removed by scavengers who dispose of it in an out of
20 sight, out of mind manner. If you read this entire
21 memo on how GE removed waste Pyranol, nowhere is there
22 any discussion of sales of scrap Pyranol as a useful
23 product to make paint.

24 GE just didn't think of it that way at the
25 time. GE just thought of it as being removed by

1 scavengers for some unknown purpose that did not
2 matter. It was out of sight, out of mind.

3 THE COURT: Well, they knew that people were
4 using it as a dust suppressant so it could be valuable
5 to scavengers as a dust suppressant. The idea of
6 insecticide is a little harder for me to understand.
7 The idea of an herbicide is easier to understand --
8 you pour oil on the plants and they die -- but the
9 principal use for these kinds of waste oils was to go
10 around -- waste oils and products like waste oils like
11 PCBs -- was to go on roads and put it down on dirt
12 roads because they would get dusty otherwise. It's
13 called oiling the roads. That's what they used to do
14 with all of this stuff. So GE well understood it
15 would be valuable for scavengers for that use because
16 it knew, and it's witnesses testified, that some of it
17 was used for the town in that way in the area.

18 MS. FISKE: Exactly. Similarly, I would like
19 to turn to a 1975 survey. That's Exhibit 19. You see
20 this one during our opening statement --

21 THE COURT: Again, significantly, in my view,
22 the way I understand the law, dust suppressant uses
23 are disposals. So that all of the uses that GE was
24 aware of, other than whatever Fletcher was doing, were
25 disposals.

1 MS. FISKE: That's exactly right, your Honor.

2 Here you have -- again, as my co-counsel, Mr. Flynn,
3 has indicated, you are the company you keep -- and
4 here you see method and place of disposal throughout
5 that time period as being to landfills and to
6 Fletcher's. Also in --

7 THE COURT: Wait, wait. I couldn't glean
8 that much from it because the chart seems to say where
9 disposed, and then it was modified to say method and
10 place of.

11 MS. FISKE: That's correct.

12 THE COURT: And how do I glean from this --
13 what does it tell me about method of disposal?

14 MS. FISKE: Method, I think, is determined by
15 where it is sent. I think it's implicit in where it's
16 sent.

17 THE COURT: One of them is explicit. It
18 says, disposed of in landfill located on the west side
19 of South Glenn Falls, right?

20 MS. FISKE: Yes.

21 THE COURT: And the others are not explicit.
22 Is there evidence to believe that GE understood that
23 Rockland Environmental Service, Chem-Trol, were land
24 fillers of the waste?

25 MS. FISKE: I believe they're chemical waste

1 disposal companies.

2 THE COURT: Is there evidence in the record
3 that GE understood that?

4 MS. FISKE: It depends on your -- I know
5 there was deposition testimony that we have designated
6 on this point. I don't know whether those were
7 included in the material --

8 THE COURT: I don't remember. It might be.
9 I read an awful lot of this stuff.

10 MS. FISKE: I don't remember myself. I know
11 it's in the greater record that was filed by the
12 parties, but I'm not sure if it was focused
13 specifically or drawn to your attention.

14 THE COURT: Okay.

15 MS. FISKE: Given the various facts and
16 circumstances I've discussed above, including the
17 nature of scrap Pyranol, it's clear that GE intended
18 or knew that it was absolutely certain that at least
19 some of the material would be disposed of. At the
20 same time we expect GE to assert that its employees
21 believed that all this material would be used to make
22 paint, but, your Honor, the only testimony that GE can
23 submit to support that position is that of Mr. Clark.

24 Mr. Clark is a loyal GE employee who was the
25 only one brought to trial -- and whether you find his

1 testimony credible or whether you find that it was --
2 had an objectively reasonable basis to believe all of
3 this material was used to make paint, he is a
4 tangential figure who has no personal knowledge of all
5 that occurred and he was only at the GE plant for a
6 short period of time; and as you have recognized, he
7 specifically admits that his primary purpose -- what
8 he was concerned about more than anything else was
9 making sure that this material was removed from the GE
10 facilities.

11 So I'm getting close to my closing, and I
12 want to make just a couple of final points again about
13 the last years of the relationship. The evidence in
14 the record shows that the last two years GE sent
15 Fletcher's scrap Pyranol by contract truck. Due to
16 the use of the contract truck there was no Fletcher's
17 employee at the time to supervise what material was
18 being loaded on the truck. By this time GE knew that
19 Fletcher's could not use a portion of the scrap
20 Pyranol being shipped to Fletcher's. Fletcher's had
21 previously informed Metevier that he didn't want
22 junky, thinned-out versions. Then under Mr. Varnum's
23 years, GE witnessed Mr. Fletcher refusing to take bad,
24 thinned-out, junky material, and so by 1966, when GE
25 sent Fletcher's material by contract truck, GE

1 indiscriminately loaded all of this material onto the
2 truck knowing that Mr. Fletcher was not going to be
3 able to use all of it and would not want all of it to
4 make paint.

5 As Fletcher wrote to GE, GE loaded everything
6 under God's green earth onto the truck and then
7 expected Fletcher's to pay for it, although it didn't
8 even matter if Fletcher's paid for it or not.

9 The United States agrees with your Honor that
10 GE is liable if only one transaction for one drum of
11 scrap Pyranol was an arrangement for disposal. The
12 evidence here has shown at trial that for at least two
13 years GE sent approximately 1,800 drums of scrap
14 Pyranol to Fletcher's where much of it he did not want
15 and could not use.

16 THE COURT: Do you think there's any evidence
17 in the record that when GE made this arrangement with
18 Fletcher at any point that any GE employee desired
19 that the scrap Pyranol be discharged, deposited,
20 injected, dumped, spilled, leaked or placed into or on
21 land so that the waste may enter the environment? Do
22 you think that they desired that? That there's any
23 evidence that that was, in fact, the objective? What
24 we want to do is we want to cause Pyranol to be put
25 into the environment?

1 MS. FISKE: Your Honor, the closest to that
2 testimony is Mr. Abbe's testimony where he said the
3 rest of it Mr. Fletcher could dispose of however he
4 wanted to.

5 THE COURT: We knew that that would happen,
6 but I'm trying to make this distinction between that
7 which is your objective. The objective of a
8 conspiracy is to distribute drugs, say. I don't think
9 that there's any evidence in the record that would
10 suggest that any GE employee involved in this
11 arrangement with Fletcher desired this disposal; and I
12 think if desired disposal were the standard, you would
13 have almost no case in which there would be arranger
14 liability. It's undisputed that GE's principal
15 objective was to be rid of the scrap Pyranol. It
16 seems to me the evidence suggests that GE was
17 indifferent as to whether it would be used in a
18 product or released into the environment.

19 The disputed question is was it aware that
20 it -- or substantially certain that it would be
21 disposed of, but I don't see any evidence that anyone
22 at GE desired the release of this hazardous substance
23 into the environment. Only that it wanted to be rid
24 of it and was indifferent to whether it was disposed;
25 of; and perhaps as you're arguing, that it understood

1 and was aware that disposal would be substantially
2 certain to follow.

3 MS. FISKE: Your Honor, I think we win our
4 case on constructive intent, as you suggest, and not
5 actual intent.

6 THE COURT: If you define intent to be
7 equivalent to purpose, that is objective -- that is,
8 this is what I want to happen -- as I said, almost no
9 chemical disposer -- when they put something in a
10 landfill, they're not desiring that it be released
11 into the environment. They want to be rid of it.

12 Now, you could argue somebody who uses it as
13 a dust suppressant actually desires its release into
14 the environment, but those applications are very
15 limited. Most people that arrange for disposal do not
16 desire the release of it into the environment. They
17 desire to be rid of it.

18 The term disposal is commonly understood.
19 It's not the Solid Waste Disposal Act definition.
20 It's to be rid of, and certainly they all desired to
21 be rid of it, but that isn't sufficient. And so
22 putting those terms together, that's why I reach the
23 conclusion that the only reasonable way to construe
24 arranged for disposal is to see that term as
25 encompassing cases in which -- there isn't evidence

1 that they desired release into the environment but
2 that they understood that released into the
3 environment would inevitably follow from the
4 arrangement that they have made. Otherwise it becomes
5 almost a meaningless provision and captures almost
6 nobody, and that is inconsistent with the concept of
7 polluter pays.

8 For example, you could have somebody under
9 that definition who takes its hazardous waste and
10 conceals it in the trash that the waste company hauls
11 and still have that person not be guilty as an
12 arranger if they testified, and the fact finder
13 believed them, we didn't care what happened to it. We
14 just didn't want to have it anymore. Did you know it
15 would get into the environment? Yes. That's not what
16 we desired. We knew it would happen but -- that has
17 to be an arrangement for disposal, doesn't it? If
18 somebody goes to the waste company that they know is
19 landfilling the waste and they conceal hazardous waste
20 in with non-hazardous waste knowing that the contract
21 doesn't permit that, but they aren't an arranger
22 because they didn't desire to put it into the ground?
23 They just were indifferent to it and wanted to be rid
24 of it? That can't be what arranger means. I think
25 that is why GE has essentially conceded that that kind

1 of very limited definition of arranger liability is
2 incompatible with the language and purpose of CERCLA.

3 MS. FISKE: I agree with that. I'm almost --
4 one more page.

5 THE COURT: Finish up and then we'll break
6 early for lunch. I don't want to have to interrupt
7 your presentation. It would be too hard to come back
8 without a lunch break.

9 MS. FISKE: We're focusing on these last two
10 years where GE has been loading everything under God's
11 green earth onto the contract truck knowing that
12 Fletcher's does not want all of this material and has
13 specifically rejected some of it, and then at the
14 close of this time period Mr. Fletcher writes a letter
15 to GE saying, I want you to -- I'll pay you for this
16 material that you gave me, although I only want some
17 of it. I only want the good stuff. I want you to pay
18 for the return of the material I don't want. You can
19 come check it out. You can look and see what I have,
20 and you can -- we'll go through it drum by drum and
21 I'm not hiding anything. There's a lot of this stuff
22 here that is junk.

23 GE analyses this claim and decides that it's
24 valid but that it's not worth the hassle to pursue.
25 So at this point -- the point of this letter -- Mr.

1 Abbe and Mr. Clark confer, and this is a
2 contemporaneous decision about sale and disposal.
3 They decide it's not worth it to collect the money
4 from Mr. Fletcher. Instead they're just going to give
5 it all to him for free. They're not going to bother
6 to come get the stuff that he doesn't want and cannot
7 use. Instead, they're going to leave the problem of
8 how to dispose of it to Mr. Fletcher.

9 THE COURT: Let me ask a hypothetical
10 question. If the evidence were such that up until
11 that point it's undisputed that GE thought every bit
12 of Pyranol was going to be used in paint and only
13 discovered for the first time when it got Fletcher's
14 letter that Fletcher couldn't use all of it in paint,
15 does GE's decision to write off the debt count as an
16 arrangement for disposal? Because it's already
17 transferred title to Fletcher. It's just a refusal to
18 take it back. And if that's the first knowledge it
19 had that it was not usable by Fletcher -- suppose
20 Fletcher had written a contract that said I am
21 disposing of every bit of this by putting it into
22 paint and I certify under oath that that's what I've
23 done with every drop up until now, and then he writes
24 this letter and GE does what it does. Is GE an
25 arranger at that point?

1 MS. FISKE: That's a harder decision.

2 THE COURT: Yeah. That is a more interesting
3 question. You could argue that if there's a -- if the
4 contract terms are such that you could only deliver
5 Pyranol of a certain quality and you deliver Pyranol
6 of a bad quality, that you have an obligation under
7 the contract to take it back, and your refusal to take
8 it back under circumstances where you know disposal
9 will result makes you an arranger. You could make
10 that argument, but it seems to me that the point
11 you're making is that this evidence is useful because
12 it is consistent with our view of the case, which is
13 GE knew when it put those barrels on the truck that it
14 would not be usable, that it was going to be disposed
15 of, and this merely confirmed what GE knew from the
16 beginning. Fletcher is now calling them on it. The
17 barrels that you knew were garbage when you put them
18 on my truck and knew that they would have to be
19 disposed of, I want you to take back, and they didn't
20 take them back.

21 MS. FISKE: That's right. In addition, you
22 heard testimony from both Mr. Clark and Mr. Abbe that
23 even after they had written off this debt, they were
24 both still hoping that Mr. Fletcher would continue the
25 relationship and continue to remove more of this

1 material.

2 THE COURT: Well, GE says they did continue
3 the relationship and they did remove it.

4 MS. FISKE: Either way, I'm not sure the
5 evidence actually reflects that, but even if it were
6 true, it seems to me that it helps our argument
7 because right smack in the middle of it then is this
8 contemporaneous decision that, oh, you can have it all
9 for free and I'm not going to bother to come get it.
10 Especially I'm doing this so you promise to come get
11 more of this stuff. You know, maybe we'll give you
12 more of this stuff that you don't want and cannot use.

13 I think that fact helps us in showing that
14 what has been implicit all along is now explicit.
15 That GE just hopes to remove this stuff and give it to
16 Fletcher's. Good, if he can use some of it, but if he
17 can't, then he can just figure out how to dispose of
18 it, and that's a win/win situation for GE.

19 GE transferred the problem of disposing of
20 its hazardous waste from GE to Fletcher's. Here GE's
21 actions and words show GE cared only about removing
22 the material from its facilities, not about selling a
23 useful product. GE knew that Fletcher could not use
24 and did not want some of the material but gave it to
25 him anyway. Scrap Pyranol now contaminates the site,

1 and for this period during the contract truck years,
2 GE should be found liable.

3 In closing, when the Court considers all of
4 the evidence underlying the relationship between
5 Fletcher's and GE, the United States has established
6 by a preponderance of the evidence that GE knew that
7 Fletcher's would dispose of some of this scrap
8 Pyranol.

9 It was predictable that Fletcher's would not
10 be able to apply all of the scrap Pyranol to any
11 useful purpose. GE knew what was in those random
12 drums of mixture of waste material. Fletcher's also
13 told GE at least three times, once through Mr.
14 Metevier, once through Mr. Varnum and finally in the
15 1968 letter, that he did not want and could not use
16 thin, junky Pyranol but GE gave it to him anyway. So
17 the inevitable came to pass, and now the United States
18 asks that you find GE responsible for cleaning up its
19 hazardous wastes at the Milford Superfund site --
20 Fletcher's Superfund site.

21 THE COURT: All right. It's 11:53 so let's
22 take a lunch break until 1:15, and then GE can make
23 its presentation, and then I'll take a break and I'll
24 give you my ruling. All right?

25 (Recess)

1 THE COURT: Okay. Counsel. Go ahead.

2 MR. BIAGETTI: Your Honor, first of all on
3 behalf of me and the trial team, as well as Mr. Hill
4 and Ms. Moreno here from GE, we thank you very much
5 for your time, the extra time over the weekend and
6 most especially for the scrutiny that I know that you
7 have given to the evidence, to the record because I
8 think in this case, in particular, the proven facts
9 proven by a preponderance, are the most important
10 element here, and when your Honor reviews the
11 evidence, it will be clear, we believe, that on the
12 facts proven by a preponderance -- not where evidence
13 is in equipoise and not where it favors GE -- that the
14 inferences you may draw from those facts do not meet
15 the standard that your Honor has set out.

16 There's a case called Ricci, your Honor, in
17 the First Circuit which counseled district court
18 judges that they are not to superimpose their own
19 ideas of likelihood or probability, no matter how
20 reasonable those ideas may be.

21 THE COURT: What does that mean?

22 MR. BIAGETTI: It means, your Honor,
23 respectfully, that as you sit here today in 2008 and
24 look at the evidence and make connections between it,
25 that those connections may not be substituted for

1 immediately drawn inferences from the proven facts,
2 and I'll give you a couple of examples.

3 THE COURT: Well, I think I'm supposed to do
4 the same thing I instruct jurors to do, which is to
5 base your verdict solely on the evidence but to use
6 your common sense in interpreting the evidence.

7 That's part -- both of those things are standard jury
8 instructions. Base the evidence totally on the
9 testimony of the witnesses, the exhibits, the direct
10 evidence that is produced during the trial and then
11 draw inferences that are reasonable in light of your
12 daily experience and your common sense. Use both, in
13 other words, direct evidence and circumstantial
14 evidence.

15 When it comes to an issue of intent or a
16 scienter, generally -- almost always that has to be
17 based largely on circumstantial evidence so it seems
18 to, by definition, require making inferences --
19 inferences that are based on the evidence and that are
20 reasonable in light of daily experience and common
21 sense.

22 MR. BIAGETTI: Of course.

23 THE COURT: So certainly I wouldn't
24 substitute my own ideas for evidence, but I think that
25 I have to use common sense in trying to interpret the

1 evidence.

2 MR. BIAGETTI: Of course, and inferences
3 based on facts proven by a preponderance. Let me give
4 one example. This small but frankly pivotal --
5 especially after hearing the government's closing --
6 evidence about whether GE sent its man to haul -- can
7 we put up the excerpt from the Fletcher letter? You
8 remember this one, Judge. Some trucker, who you
9 evidently called, has been hauling to us, and our
10 office has been paying him \$150 per load. An
11 important fact in the case -- an important piece of
12 evidence because the government says it was after this
13 that GE started sending it everything under God's
14 green earth. Mr. Fletcher says though -- first of
15 all, you would have to take that statement for the
16 truth that it happened, but it's defied by the record.
17 The proven facts --

18 THE COURT: Give me the whole exhibit because
19 I didn't gather that until they put up the exhibit.
20 What the government says is that there's a reference
21 earlier on in that letter that makes clear that what
22 Fletcher was saying is, first, I sent my own people.
23 Then I had a contractor of mine who went out of
24 business. Then you found a contractor and the
25 reference to "your man" is the reference to the

1 contractor that GE supplied. So that they are not
2 saying that it was a GE truck. They're saying it was
3 a private contractor that had been found by GE and
4 that that's how to interpret the letter.

5 MR. BIAGETTI: Yes, they are.

6 THE COURT: You said that's wrong. The
7 letter can't be interpreted that way.

8 MR. BIAGETTI: Not only is that wrong,
9 there's no evidence to support it.

10 THE COURT: What's the exhibit number?

11 MR. BIAGETTI: The exhibit is 15.

12 THE COURT: All right. I'll have my clerk
13 hand me up the actual physical copy. It may be in a
14 pile over here, Vinny. I don't know. Let me take a
15 moment and reread it. Okay. So the government
16 contends that the phrase "your man" in Exhibit 15
17 refers to a contract trucker hired by -- or found by
18 GE but paid for by Fletcher. You say that that's not
19 true, and make your argument.

20 MR. BIAGETTI: Defied by the record evidence.

21 Hooper, at page 41, recalled that only he and an
22 independent trucker hired by Fletcher named Ross made
23 any such deliveries. Whitney recalled that only
24 Hooper -- at page 48, Whitney recalled that only
25 Hooper and an independent trucker named Madsen hired

1 by Fletcher made any --

2 THE COURT: That's kind of a fine
3 distinction. In the letter it's clear that Fletcher
4 paid for all of the truckers, whether they were found
5 by GE or not. So an employee well understood the
6 trucker to be hired by Fletcher. He just wasn't found
7 by Fletcher. That's what the "your man" reference is.
8 Why does it even matter? The important thing is
9 somebody other than a Fletcher employee was up there,
10 and during that time they were loading bad barrels on
11 the truck.

12 MR. BIAGETTI: And there's no evidence,
13 Judge. That, respectfully, is a leap. There's no
14 evidence that the testing stopped simply because a
15 load or two was picked up by somebody like Madsen or
16 by Ross. There's no testimony to that effect. Mr.
17 Hooper --

18 THE COURT: Where's the evidence that there
19 was testing of any drum that was taken by any contract
20 hauler? The only evidence I heard of hydrometer
21 testing was by Fletcher employees.

22 MR. BIAGETTI: Hooper says that he and the
23 crew did the testing at GE, and then that some was
24 done back at Fletcher. There's no evidence that
25 Hooper --

1 THE COURT: Yeah, but there's no evidence to
2 suggest that at any point while a contract trucker was
3 used that hydrometer testing was done at the GE dock
4 before they were loaded onto the trucks, and Hooper
5 says that it wasn't done and that's why they have
6 the -- excuse me -- Fletcher says in his letter that
7 it wasn't done and that's why I got garbage Pyranol.
8 So there's no evidence to suggest that that's wrong.

9 MR. BIAGETTI: There are 17 shipments, Judge,
10 during that time period where Fletcher claims he's
11 paying \$150 a load now, in this letter, to haul to his
12 factory. If you look at the dunning letter that is
13 Exhibit 13, 17 pick-ups are made during this time
14 period, Judge, 70 drums per pick up, and we are
15 supposed to believe that Fletcher paid 150 bucks for
16 every one of those bad loads, accepted every one of
17 those bad loads and never made a peep about their
18 quality until -- not coincidentally -- after he is
19 dunned for payment a couple weeks before this letter
20 by Mr. Clark. That's the evidence.

21 THE COURT: All right. That's a different
22 point. You want me to say that this letter is -- that
23 Fletcher is making this up to avoid having to pay,
24 right? That's your interpretation of this. That
25 there really wasn't a problem with any of the loads.

1 It only comes up after Fletcher is asked to pay and he
2 doesn't want to pay. All right. I understand that.

3 The problem with that is that the testing
4 that was done of a similar kind of Pyranol at the
5 scrap Pyranol facility by -- at GE's direction by
6 Monsanto corroborated the claim that a lot of the
7 Pyranol was junk, and your witness so acknowledged in
8 the letter to Mr. Clark.

9 That's some evidence to actually support the
10 idea that this stuff was -- a lot of it was of
11 unacceptable quality, isn't it?

12 MR. BIAGETTI: The Pyranol that was tested by
13 Monsanto was Pyranol that Fletcher had not selected to
14 take back to Fletcher. We know that. It was at GE --

15 THE COURT: I don't know that because the
16 evidence is that no selecting was going on at that
17 time. So this was not rejected Pyranol by Fletcher,
18 and indeed, why would GE, in trying to determine
19 whether they should press Fletcher for payment, test
20 barrels that he rejected? The most logical inference
21 is they tested representative, sample barrels because
22 that's what they're trying to do, confirm or refute
23 the contention that the barrels Fletcher got were
24 junk. If they were testing barrels that Fletcher
25 rejected, they wouldn't be confirming or refuting the

1 claim that Fletcher was making. It was only if they
2 took representative samples that would allow them to
3 confirm or refute.

4 How does saying we tested barrels that
5 Fletcher rejected, and it turned out they were
6 correctly rejected. Therefore, we can infer that
7 Fletcher's claim that he got a lot of junk from us is
8 valid. That doesn't make any logical sense.

9 MR. BIAGETTI: There's no evidence, your
10 Honor, that the testing at GE that Mr. Varnum had
11 required ever stopped. We have evidence that Mr.
12 Varnum retired. There is not a wit of evidence that
13 any of the testing that Mr. Varnum had required ever
14 stopped.

15 THE COURT: I don't believe there's any
16 evidence that Mr. Varnum ever required testing. The
17 evidence is that Fletcher required testing in order to
18 address a problem that Varnum created when, as Hooper
19 testified, he would require Fletcher to pay for every
20 drum that was taken, and Fletcher then concluded we
21 have to test drums before we take it. Varnum won't
22 make allowances like Metevier had in the past.
23 There's no evidence that Varnum ever required that
24 testing be done.

25 MR. BIAGETTI: I take your point. There's no

1 evidence of the circumstances created during the
2 Varnum years changed after that. None.

3 THE COURT: I would like to see some evidence
4 that there was any testing done of any Pyranol shipped
5 by a private contractor because there's no evidence in
6 the record that it was ever done.

7 MR. BIAGETTI: Then we get back to the
8 preponderance, Judge. At worst that evidence is in
9 equipoise. You cannot draw an inference that no
10 testing was done after Varnum was hired.

11 THE COURT: He asserts that no testing was
12 done because he says, I got a lot of junk that I
13 wasn't getting when I was doing testing.

14 MR. BIAGETTI: And his own employee who
15 picked up all of this stuff, Hooper, says that the
16 quality never changed throughout this time, and Clark
17 says that he never got a complaint from Fletcher until
18 Clark --

19 THE COURT: That second point I think is
20 something I need to consider. I understand that
21 argument, and I think it's a valid argument.

22 MR. BIAGETTI: And he accepted 17 pick-ups
23 during this time, 70 drums each, a savvy businessman,
24 and never makes a peep. Instead, he pays 150 bucks a
25 load for what he claims is junk. It makes no sense,

1 respectfully.

2 THE COURT: If he's getting it for free, 150
3 bucks is great. If he can get a couple of barrels of
4 good Pyranol, even if he's got a bunch of bad barrels,
5 but if he has to start paying for every barrel, then
6 it becomes a problem.

7 MR. BIAGETTI: And of course the evidence in
8 the case is that every single one of these barrels --
9 even if you believe that the Monsanto analysis of
10 drums back at GE is reflective of what Mr. Fletcher
11 got, we have the expert testimony unrebutted of
12 Girard.

13 In fact, Mr. Portfolio, the United States'
14 expert, agrees that even Pyranol contaminated with up
15 to 22 percent of TCE, precisely what's described by
16 the Monsanto analysis, is usable for the purpose that
17 Fletcher was selling it, as an extender and roof
18 coating. It is useful for that purpose --

19 THE COURT: What evidence is there on the
20 record that GE understood that Fletcher was selling
21 this as an extender and roof coating?

22 MR. BIAGETTI: There is none that he
23 understood it was being done for that, but when you
24 get to the government's point about the inevitable
25 came to pass, there's no evidence that discard or

1 uselessness ever came to pass. All of the evidence is
2 to the contrary.

3 THE COURT: There's one damning piece of
4 evidence of intent, and that's Mr. Abbe's own
5 statement that, we hoped he could use some of it and
6 thought he would dispose of the rest. That's pretty
7 damning to you, isn't it?

8 MR. BIAGETTI: That's not the Abbe testimony,
9 respectfully.

10 THE COURT: Well, let's get out the actual
11 quote. I've read it, and maybe I wrote it down
12 incorrectly, but put it up there.

13 MR. BIAGETTI: The balance of it he could
14 dispose of -- Abbe 77 -- he could dispose of. She
15 then asks him -- she tries to refresh him three times
16 on what he knew on the subject, Judge, and he says at
17 page 54, "The only thing I knew he was doing with it
18 was adding it to paint." That's what Mr. Abbe tells
19 the government agent back in 1992 in Exhibit 80,
20 Judge. He says, "The only thing I knew was that he
21 had a use for it."

22 On page 56, "The only thing I knew for sure
23 was that they were adding it to paint." On page 93,
24 "Do you remember learning from anybody from GE or
25 Fletcher that Fletcher was disposing of some

1 quantity?" Answer: "No."

2 Now, when you challenge the government on
3 what evidence there was that GE knew that Fletcher was
4 using it for something else, and Ms. Fiske pointed to
5 Richard Fletcher. He was using it on dust. Richard
6 Fletcher, at page 64, says that Fletcher was using
7 Aroclor on dust. He never says he was using
8 Pyranol --

9 THE COURT: He wasn't using Aroclor. That's
10 the most implausible, silly argument I've ever heard.
11 He's going to buy Aroclor at \$3 a gallon to use as a
12 dust suppressant when he's got thousands of barrels of
13 Pyranol? That just strains -- I mean that doesn't
14 pass the straight face test.

15 MR. BIAGETTI: It's the only evidence of any
16 knowledge of any other use --

17 THE COURT: I think the argument you should
18 be making, which is a much more potent argument, is
19 that this whole issue of dust suppressant is a red
20 herring because there's no evidence that anyone in GE
21 ever knew that Fletcher was ever using it as a dust
22 suppressant, but to say that Fletcher was using
23 Aroclor as a dust suppressant when he was drowning in
24 contaminated Pyranol is absurd.

25 MR. BIAGETTI: Judge, we made it clear in the

1 opening. We showed you a graph and we proved that GE
2 only knew that Fletcher made paint, and he added
3 plasticizer to paint.

4 THE COURT: There's no evidence to suggest
5 that GE knew that Fletcher was using this as a dust
6 suppressant.

7 MR. BIAGETTI: None. It's simply an
8 illustration -- and I will move on -- that you have to
9 look at the evidence and decide whether or not
10 inferences may be drawn from it.

11 THE COURT: Your example you give is a good
12 one in which a judge cannot throw common sense out the
13 window, okay? People -- he was referring to Aroclor
14 as the generic name for the scrap Aroclor he was
15 getting from whatever sources, which includes Sprague
16 and other places.

17 MR. BIAGETTI: Thank you.

18 THE COURT: He wasn't using it to refer to
19 Aroclor that was bought from Monsanto at \$3 a gallon
20 because you don't pour money down the drain when you
21 don't need to. That's common sense. Do I have direct
22 evidence? Is there a witness who said, no, we didn't
23 use Aroclor from Monsanto as a dust suppressant? I
24 don't need to have somebody testify that, you know,
25 when he's talking about Aroclor, he's talking about

1 scrap Aroclor, which includes Pyranol. It isn't
2 virgin Aroclor because it's -- I'm entitled to use
3 common sense and say, people don't behave
4 irrationally. You have free Pyranol you've already
5 got -- whatever you paid for you've got there. You're
6 going to go to the store and buy \$3 a gallon Aroclor
7 to pour on the ground? No. That's an example of how
8 a judge can use common sense to understand the
9 evidence. That's not substituting my own theories for
10 facts. That's using common sense.

11 MR. BIAGETTI: I understand, and you made the
12 point, your Honor, that the evidence showed that Mr.
13 Fletcher was also buying used Aroclor from Sprague and
14 Aerovox so that could have been what was going on, as
15 well.

16 THE COURT: That's correct.

17 MR. BIAGETTI: The point is the evidence, if
18 it's in equipoise, the fact is not proven. If the
19 fact is not proven, then an inference may not be drawn
20 reasonably from it.

21 On a bigger issue -- and I think your Honor
22 recognized this in the comments before Ms. Fiske that
23 we had -- you must find that GE knew or must have
24 known of an event that did not, in fact, occur;
25 namely, a disposal, a discarding by Fletcher.

1 THE COURT: Wait. I think we're on a
2 completely different understanding. What the
3 government has to prove is otherwise arranged for
4 disposal. The government doesn't have to prove
5 disposal to prove they otherwise arranged for
6 disposal. So to the extent you're suggesting that
7 disposal never happened, the government can't prove
8 that disposal ever happened. Therefore, it cannot
9 prove that GE otherwise arranged for disposal. No,
10 that does not logically follow from the other.

11 In fact, you don't have to prove a disposal
12 to prove that GE arranged for disposal. To ultimately
13 prove liability here, you have to establish that, but
14 you've conceded that part of it and that part is not
15 an issue in this case. So I don't buy the proposition
16 that you win unless the government has proved here
17 more likely than not that there was a disposal of
18 scrap Pyranol at the Fletcher paint work site.

19 MR. BIAGETTI: Whether or not there was, in
20 fact, a disposal by Fletcher is probative of what GE
21 knew.

22 THE COURT: It is probative. It is not
23 conclusive. I said that earlier.

24 MR. BIAGETTI: We agreed but that is another
25 inference that will have to be drawn here. There is

1 nothing inevitable about discard of what Fletcher had
2 because the experts agree -- can we put up that
3 graphic -- the experts agree that all of the Pyranol
4 that was sold, to the extent we have evidence of
5 descriptions of it, was usable for the purposes to
6 which Fletcher and Webster were putting it, and we
7 point out that even up to 22 percent PCB, what the
8 Monsanto folks report that they found in the drums
9 back at GE, would not have presented a problem in the
10 roof coating, as PCB and TCE are good solvents for
11 asphalt and both faster drying than mineral spirits.

12 We have the testimony of Mr. Hooper that they
13 would add --

14 THE COURT: I think the roof coating is
15 another complete red herring. There's no evidence
16 that GE knew about this potential use as an extender.

17 There's no evidence that it was understood in the
18 market that Aroclor was, in fact, used this way.

19 There's no evidence that Fletcher ever told anybody it
20 was being used in this way. So to suggest that it is
21 theoretically possible that it could be used for an
22 extender says nothing of value in the case.

23 MR. BIAGETTI: I respectfully disagree.

24 First of all, we just agreed that whether or not
25 Fletcher discarded is probative of whether or not GE

1 knew that. It is probative that Fletcher never
2 discarded because he had a customer who was buying all
3 the thin stuff. You have the testimony of Mr. Hooper,
4 for example, your Honor, who said that they
5 deliberately --

6 THE COURT: Hooper never testified that he
7 bought all of the scrap Pyranol on the Fletcher site,
8 thousands of barrels, they bought it all and used it
9 as extender. That's fantasy land. There's no
10 evidence of that.

11 MR. BIAGETTI: Hooper's testimony is that
12 Webster received a lot of the thin stuff. A lot.
13 That Kamieniki took a lot of what was left, even after
14 1968, and that of course everything else was either
15 usable by Fletcher as plasticizer or he sold it to
16 several customers. That was Hooper's testimony. The
17 good stuff --

18 THE COURT: I think there was evidence to
19 suggest that it may have been sold to multiple
20 customers early on and there was -- there was evidence
21 to suggest that some -- certainly not all -- was sold
22 to the predecessor, to Webtex, but that vast
23 quantities, the vast bulk of it, remained on the site
24 well past the days when Fletcher was operating it as a
25 viable paint business. The evidence seems almost

1 undisputed on that point.

2 MR. BIAGETTI: There's no evidence that it

3 was vast quantities, but to whatever extent --

4 THE COURT: You stipulated that there were

5 over 3,000 barrels of Pyranol taken to the site from

6 GE. You stipulated to that. You stipulated to an

7 amount of Pyranol that produces at least 3,500 barrels

8 more than that -- I'm using a very conservative

9 number -- stipulated to that. So the idea that there

10 isn't evidence that there were vast quantities brought

11 to the site is silly. There clearly were.

12 MR. BIAGETTI: I misheard you, Judge. Those

13 quantities were brought to the site. I thought you

14 meant there was evidence that those sat at the site.

15 THE COURT: And most of the scrap Aroclor

16 that was purchased came from GE, not from the other

17 sources. And there were thousands of barrels at the

18 site well past the 1970s when there were no further

19 operations. We saw pictures of it. Now, some of

20 those could have been other things other than Pyranol,

21 but the witness testified that was in the area where

22 he knew Pyranol was stored because he worked there.

23 MR. BIAGETTI: And the same witness said that

24 was the area where they piled Aroclor that came from

25 Aerovox.

1 THE COURT: But the bulk of it came from GE.

2 MR. BIAGETTI: And was stored along with
3 Aroclor from Sprague and Aerovox, resins, oils,
4 linseed oil, paint, other products that Fletcher was
5 buying. There was not one witness -- Racicot, Hooper,
6 Whitney -- who was able to say that he could identify
7 any marks of any kind on any of those drums after '68
8 to identify them as GE's. I mention that there's no
9 chemical evidence that even establishes that there
10 were PCBs in any of those drums, let alone that they
11 were scrap Pyranol, let alone that it was GE's. No
12 evidence of that. The evidence is --

13 THE COURT: Not because they were tested and
14 found not to contain that, right? Because the barrels
15 were all removed before there was testing, right? So
16 let's be careful we don't create confusion about the
17 reality. Nobody tested the barrels and found them not
18 to be PCBs. The barrels were removed, right, so
19 nobody could test them?

20 MR. BIAGETTI: The barrels were removed by
21 EPA.

22 THE COURT: EPA removed the barrels? You
23 never tested the barrels?

24 MS. FISKE: Your Honor, Mr. Kamieniki removed
25 many of the barrels in 1983 after TSCA had been

1 passed. And then in addition, EPA tested the drums
2 that were remaining and removed them.

3 THE COURT: And none of those were PCB.

4 MS. FISKE: Some of those did contain PCB.

5 THE COURT: Well, then what's he saying when
6 they didn't? Because that's not the phase of the
7 trial we're involved with. That's not what's being
8 proved today, but don't tell me that there's no
9 evidence that any of the drums contained PCBs if they
10 were sampled and shown to contain PCBs.

11 MR. BIAGETTI: I said there was no evidence
12 in the record of this case, your Honor.

13 THE COURT: That's really bad, counsel.

14 Don't do that to me.

15 MR. BIAGETTI: But here is the more important
16 point --

17 THE COURT: That's way too tricky. Do not
18 mislead courts. That's not a good thing.

19 MR. BIAGETTI: I'm not trying to mislead you,
20 Judge. I'm trying to make the point that none of
21 those witnesses -- Racicot, Hooper, Whitney --
22 identified any of the barrels as GE's barrels, okay?

23 THE COURT: I accept that.

24 MR. BIAGETTI: Okay, but more importantly, we
25 know that Fletcher, after February of 1968, did not

1 discard a single one of these barrels. He stored them
2 on pallets. He cared for them. Mr. Whitney said we
3 would even go into the pile to check for leakers and
4 fix them. He sold some to --

5 THE COURT: I saw the picture of the barrels
6 turned on their side and stacked four and five deep by
7 the hundreds. I saw the picture. We were able to
8 date the picture based on the age of the kids that
9 were there. The guy that took the picture, it was
10 from his yard looking at the piles of barrels that he
11 testified to he was involved in putting there, which
12 included the Pyranol.

13 MR. BIAGETTI: Judge, not a single barrel
14 discarded. There's no argument that there was a
15 release here. That's why we're here. I'm not trying
16 to be tricky, respectfully. There was a release.
17 There was not discarding or disposal by Fletcher.
18 There was quite the opposite. Even in 1974 when he
19 tries to sell it through Hub Fabric, the letter from
20 Hub says he's trying to sell it because of the current
21 plasticizer shortage. He valued this product as a
22 plasticizer substitute. He cared for it in that way.
23 He tried to sell it in that way. There is no
24 evidence, your Honor, that he tried to discard a drop
25 of it.

1 THE COURT: Your client is a sophisticated
2 company, right?

3 MR. BIAGETTI: Yes, sir.

4 THE COURT: They're in the business to make a
5 profit, right?

6 MR. BIAGETTI: Of course.

7 THE COURT: They understand chemicals, right?
8 They had a paint business, didn't they?

9 MR. BIAGETTI: In another part of the
10 country.

11 THE COURT: Okay. If the Aroclor that this
12 product, in your view, is a complete substitute for
13 sold for \$3 a gallon, right? The answer is yes
14 because you stipulated that or it's in the record.

15 MR. BIAGETTI: Yes. Stipulated.

16 THE COURT: GE paid or received from
17 Fletcher, for the stuff he paid for, four cents a
18 gallon. That's a little less than 1/100th the cost,
19 okay. If this was a valuable substitute for Aroclor,
20 would a sophisticated company like GE let it get out
21 of its hands for 1/100th of the cost of Aroclor?

22 MR. BIAGETTI: Yes. There are several --
23 because there are several leaps there in terms of what
24 was actually happening from '53 to '68. First of all,
25 you have men in a capacitor department in upstate New

1 York. They have a product that is of no further use
2 to them for their very demanding purposes. They find
3 a way -- Abbe called it wonderful, exceptional -- to
4 make a profit on the sale of this stuff. Why?
5 Because the customer was going to use it.

6 THE COURT: I'm not buying your expert's
7 theory that this is in its form, right out of the
8 barrel, could be brought to a paint company and pumped
9 into batches of paint as a plasticizer and be used as
10 an Aroclor substitute.

11 MR. BIAGETTI: Of course that's exactly what
12 Hooper says happened to the '53 batch.

13 THE COURT: Let's assume that's true. Your
14 company -- we have to look at what does your company
15 do with its scrap Pyranol. We know it dumps it into
16 the river. We know it landfills it. We know it gives
17 it away for free to local towns to use on roads, and
18 we know he sells it to Fletcher. All of the uses
19 except selling to Fletcher are disposals for which GE
20 can earn nothing and for some of which it has to pay.
21 What it gives to Fletcher it gives at 1/100th the cost
22 of virgin Aroclor. If I accept your expert's
23 interpretation as you describe it, that scrap Pyranol
24 can simply be mixed in with batches of paint and serve
25 as an effective substitute for Aroclor, I must assume

1 that GE is one of the least rational, least
2 sophisticated companies in the world because they're
3 just throwing away what they can sell to the paint
4 industry for many, many, many multiples of what it's
5 selling it to Fletcher, and of course compared to what
6 it gives it away for when it dumps it in the river or
7 pays somebody to haul it away for when it landfills
8 it, it just doesn't make any sense.

9 MR. BIAGETTI: Now, you are, Judge,
10 respectfully, superimposing the 2008 --

11 THE COURT: That's baloney, okay. That is
12 complete baloney, and I can tell you the Court of
13 Appeals will not agree with you on that point. I
14 guarantee that 100 percent. That's what fact finding
15 is. To suggest that that is substituting my own views
16 is absurd.

17 MR. BIAGETTI: Two men in upstate New York in
18 1953 --

19 THE COURT: That's fact finding. That is
20 exactly what juries do every day in the United States.
21 They take facts. What did Fletcher pay for it? They
22 take facts. What did GE do with it? They take facts.
23 What was the price of Aroclor? And they test it
24 against the reasonableness of an expert's testimony
25 that this could be used as an Aroclor substitute and

1 that it was used widely as an Aroclor substitute, and
2 it says the facts don't support that claim. That's
3 why that expert's claim is not credible, to the extent
4 he says something that extreme.

5 MR. BIAGETTI: Your Honor, when GE finds in
6 upstate New York a customer, Fletcher, okay, they are
7 told that he's going to be using it in paint. Those
8 folks in 1953 in upstate New York are not part of GE's
9 paint business. They don't know what the conglomerate
10 GE is doing in another part of the country. All they
11 see is a tremendous opportunity to make -- to solve
12 two problems.

13 THE COURT: So they don't know that there is
14 any market for -- you're telling me -- any market for
15 scrap Pyranol for use as a plasticizer anywhere in the
16 world except at Fletcher Paint because you're telling
17 me they have no knowledge of the market of paints for
18 plasticizer. So if I accept that. I must accept the
19 proposition that the only potential use that they
20 could foresee of this was as a use by Fletcher in his
21 small little paint business of paint as a plasticizer.

22 MR. BIAGETTI: That is the state of evidence,
23 yes.

24 THE COURT: Okay. If that is true, then we
25 know they think Fletcher is a small paint manufacturer

1 that is using a plasticizer, which is a minor
2 ingredient in a certain subset of paints, and to the
3 tune of 3,500 barrels of Pyranol is using that in his
4 little paint business.

5 MR. BIAGETTI: He keeps coming back for more.

6 Yes, your Honor. He keeps coming back for more.

7 Now, both Clark and Abbe testified that they
8 had no idea how much plasticizer went into paint or
9 whether or not Fletcher made other paints. We know
10 from the Fletcher witnesses that he made roof coating,
11 that the pool paint was the same formula card as the
12 rubber based paint so it could well have been used in
13 that; and of course we know that Fletcher is also
14 selling it to Webster. Why is that important, even if
15 GE doesn't know it? Because it puts into context what
16 GE was hearing from Fletcher at the time. An
17 important piece of evidence, Judge, that the United
18 States has seized on that I would ask you to take
19 another close look at, is Hooper at 31. This is when
20 he's talking about the Metevier deal, such as it is.
21 It's a piece of evidence that the government comes
22 back to again and again. Now, for circumstantial
23 knowledge of what GE knew. And what Hooper says is --
24 when he's talking about Metevier -- well, he said that
25 he understood that we were getting drums that were not

1 Pyranol or were so thinned out that it was not usable.

2 Well, first of all, Metevier understood that,
3 from whom? From Fletcher, of course, and Fletcher is
4 telling a half truth there. Fletcher is saying it's
5 of no use but he's not --

6 THE COURT: Wait a second. Are you trying to
7 display something for me?

8 MR. BIAGETTI: No. I was just reading to you
9 from Hooper 31.

10 THE COURT: Okay. I just wanted to be sure I
11 wasn't missing something.

12 MR. BIAGETTI: No. Hooper 31. He understood
13 that we were getting drums that were not Pyranol or
14 were so thinned out that it was not usable. Fletcher
15 is telling this to Metevier. Fletcher is saying it's
16 not usable. It wasn't usable to Fletcher. It was too
17 thin for the use as a plasticizer, but he, of course,
18 is selling all of it at a cheaper price to Webster.
19 He's telling Metevier something to, frankly, play him
20 in the same way that he does with Mr. Clark years
21 later. He buys all of the Pyranol.

22 We have a stipulation in this case, Judge,
23 that what Fletcher could not use, Fletcher attempted
24 to sell to other customers. He had a useful purpose
25 for every drop of this Pyranol.

1 THE COURT: Let's focus for a while on what
2 was actually in the drums. I have a witness who
3 testified that it was used -- that Pyranol was used as
4 a -- he called it pump oil. Do you agree with that?

5 MR. BIAGETTI: Yes. I believe that that was
6 Mr. Huchro on the fact that oil could get in
7 occasionally with some of the --

8 THE COURT: Also, Flexon said it about
9 booster pumps as diffusion pump oil.

10 MR. BIAGETTI: Yes.

11 THE COURT: That it was used to infuse
12 capacitors. We know that, right?

13 MR. BIAGETTI: Yes.

14 THE COURT: That Aroclor was treated at GE to
15 make Pyranol, right?

16 MR. BIAGETTI: Aroclor was treated at GE.

17 THE COURT: To make Pyranol.

18 MR. BIAGETTI: Yes.

19 THE COURT: Both filtered and had
20 additives to it.

21 MR. BIAGETTI: They made a higher standard of
22 purity than Monsanto.

23 THE COURT: Well, it had additives to it, and
24 depending on the type of Pyranol, the additive could
25 constitute in excess of 25 percent by volume of the

1 whole product, right?

2 MR. BIAGETTI: Correct.

3 THE COURT: So at various times, particularly
4 Pyranol 2, there were substantial additives put into
5 the Aroclor by GE.

6 MR. BIAGETTI: Which had no effect on the
7 purposes for which Fletcher used it, but yes.

8 THE COURT: For which GE used -- we can talk
9 about Fletcher later on -- we know that there would be
10 mineral oil on these capacitors, right?

11 MR. BIAGETTI: Yes.

12 THE COURT: We know that there were drip pans
13 to collect drippings of Pyranol as it was coming off
14 the capacitors that would sit for several days before
15 they were emptied, right?

16 MR. BIAGETTI: Yes.

17 THE COURT: We know there were troughs in the
18 floor that collected Pyranol, right?

19 MR. BIAGETTI: Yes.

20 THE COURT: We know TCE was applied as a
21 degreaser to degrease the capacitors?

22 MR. BIAGETTI: Yes.

23 THE COURT: We know TCE and Pyranol would mix
24 together and collect in these various repositories.
25 One time they called it a pit. Sometimes they called

1 it a trough. Sometimes they called it a drip pan,
2 right? You're nodding your head. And they also would
3 use -- they would try to reclaim some of the TCE in a
4 still that they would have to periodically clean out
5 and empty the bottom of these stills that would have
6 the residue of Pyranol, mineral oil, metals, other
7 matters that would not be distilled out when the TCE
8 was distilled out, right?

9 MR. BIAGETTI: Yes.

10 THE COURT: That when you use Pyranol as a
11 pump oil, pumps break, pumps need to be cleaned, pumps
12 have other kinds of contaminants in them so we know
13 that that Pyranol would have that. We know that the
14 Pyranol that would be drained out of a defective
15 capacitor would be collected, and that that would
16 contain metals and other substances. We know that
17 Pyranol would be spilled. Sometimes it would be
18 cleaned with Speedy Clean. The Speedy Clean would
19 be -- the liquid would be put into a scrap Pyranol
20 barrel and the Speedy Clean would be put into another
21 barrel, right?

22 MR. BIAGETTI: Yes.

23 THE COURT: Okay. So what we've got is -- we
24 also know there would be certain batches of this that
25 could not be brought up to spec. That they would try

1 their best when they were making the Pyranol from the
2 Aroclor and they couldn't get it up to spec so they
3 would dump the whole batch.

4 MR. BIAGETTI: Right.

5 THE COURT: There was a scrap Pyranol tank in
6 which quantities of scrap Pyranol were accumulated for
7 significant periods, and when full it would be drained
8 into 55 gallon drums, right?

9 MR. BIAGETTI: 500 to a thousand gallon tank,
10 yes.

11 THE COURT: Okay, and that would contain
12 mixtures of Pyranol from wherever the scrap Pyranol
13 would be collected, and that would be drained into 55
14 gallon drums. We also know that there would be scrap
15 Pyranol placed directly into 55 gallon drums, and so
16 the scrap Pyranol that was being sold to Fletcher's
17 was Pyranol from all of these sources, right?

18 MR. BIAGETTI: It could have been, yes.

19 We're going to talk about what was actually picked up
20 at Fletcher in a minute, but go ahead.

21 THE COURT: That's what we know about where
22 it came from.

23 MR. BIAGETTI: What it could have contained,
24 yes.

25 THE COURT: What we know from Hooper and from

1 Fletcher's letter and from Monsanto's testing of the
2 barrels is that, in fact, they varied greatly in terms
3 of what was in them, and substantial amounts of TCE
4 would be in the barrels. Water would be in the
5 barrels. Dirt would be in the barrels. Pyranol would
6 be of different color and different thicknesses from
7 barrel to barrel. We all know that, right? Do you
8 disagree with that?

9 MR. BIAGETTI: Do not disagree.

10 THE COURT: That's what we know about what
11 was in the barrels, right?

12 MR. BIAGETTI: That's what we know could be
13 in the barrels as they were created at GE, and if I
14 may for the moment -- if we could talk about the state
15 of the evidence about what Fletcher picked up?

16 THE COURT: Okay.

17 MR. BIAGETTI: Just one more point on the
18 Fletcher matter, of course. He says that prior to
19 this period of hauling by someone that Metevier was
20 very careful to make sure that Fletcher received what
21 he called the right material. So through the Metevier
22 years from Fletcher's mouth we have --

23 THE COURT: What I'm getting is that you
24 divided into several periods. The first period GE
25 just delivered stuff. The second period Fletcher

1 picked it up from Metevier. It varied greatly in
2 quality. When he got a lot of bad barrels, he called
3 Metevier. Metevier would make an adjustment and give
4 him extra barrels for free. Then there was a period
5 of Varnum. Varnum required him to pay for every
6 barrel that went off the site. So after a while he
7 went into hydrometer testing for specific gravity to
8 take the barrels that he wanted. That doesn't mean
9 that everything would be usable from it, but he would
10 take the barrels he wanted and leave behind the ones
11 that he would not. Then there was the post-Varnum
12 period where, as I understand it, Fletcher used
13 contract haulers to haul scrap Pyranol from GE and
14 that these amounted to over a thousand barrels that
15 came during this period and that Fletcher did not pay
16 for these barrels at all, was hounded about payment,
17 responded by saying the barrels contain a lot of junk
18 barrels, garbage, that I don't want and can't use,
19 that GE had some testing done by Monsanto of a
20 representative sample of drums from the scrap Pyranol
21 area, which GE concluded corroborated Fletcher's
22 explanation. And that all of that, therefore,
23 suggests that there were, throughout this period, a
24 large number of barrels, in the thousands, that were
25 of varying quality. Many of which were not of

1 acceptable quality to be used even for the uses that
2 Fletcher was trying to put it to. That's what I'm
3 taking from the evidence about what was actually in
4 the barrels. What do you see there that I've
5 overlooked?

6 MR. BIAGETTI: I'm going to get to it in one
7 second because the evidence of the independent hauling
8 is that Hooper recalled that he did it throughout and
9 occasionally Ross may have. Whitney said that Hooper
10 did it throughout and it was possible that on a couple
11 of occasions Madison did.

12 THE COURT: Do you think I'm, as a matter of
13 law, precluded from believing what's in Fletcher's
14 statements in this letter?

15 MR. BIAGETTI: As a matter of law, no, but as
16 a matter of weighing the evidence on whether or not
17 what Fletcher is saying is true, I don't think you can
18 draw the inference that it is.

19 Let me move on to what Fletcher picked up.
20 First of all, what we did on the left hand side here,
21 your Honor, is to summarize, as best we could, the
22 evidence of places where the Pyranol could have come
23 from at GE. You mentioned a couple of these already.
24 You talked about the TCE, and we know that that was
25 used for cleaning. We also know that Fletcher knew he

1 was buying Pyranol with TCE. Hooper recalled they
2 would get some with a degreaser. Hooper also recalled
3 that they would occasionally add -- Fletcher would add
4 some Tri-Clean D into the thick Pyranol so that it
5 could be tested and used. So Fletcher knew, yes, some
6 of it had Tri-Clean D, TCE, but Fletcher knew he was
7 getting that and kept buying it. He bargained with
8 Metevier to get that lower cost on the thin stuff, but
9 he was selling it to Webster and it was usable by
10 Webster for Webster's purpose. See the government's
11 expert, Portfolio.

12 We know that -- in terms of order of
13 magnitude, Judge, how much of this stuff was coming
14 from those tanks of what we call off-spec Pyranol, the
15 stuff that having been recycled several times through
16 the fuller's earth, no longer met GE's demanding
17 specifications. They had no use for it.

18 It is Huchro and Murray, the two chemical
19 engineers at Hudson Falls for the entire period in
20 question here, who described that for us. Murray is
21 the guy that says there were these 500 gallon tanks
22 that would on occasion be drummed up and marked as
23 scrap Pyranol.

24 Huchro says, yes, there was some that was
25 collected from the drip pans. About four drums a year

1 came from that process. So we have some sense, too,
2 of order of magnitude of where the scrap Pyranol was
3 coming from that ends up on the dock at GE. GE
4 admittedly, after finding Fletcher, does not treat
5 this stuff as junk. GE stores it. GE puts it in a
6 separate area. Clark said this. GE labels it --

7 THE COURT: But he said we're drowning in
8 Pyranol. We've got to get rid of this stuff.

9 MR. BIAGETTI: I know your Honor talked about
10 the dual purpose. If the only thing that GE wanted to
11 do was solve its space problem, why not dump
12 the contents and sell the drums? They're worth \$1.25
13 each. The government was talking in their closing
14 arguments about the value of the drums. Why not dump
15 the Pyranol in the river or whatever and sell the
16 drums for a buck twenty-five? Why not -- we had the
17 evidence -- the letter about the mobile landfill
18 operations. In that same letter when Abbe is talking
19 about drowning in Pyranol, he says can he go and use a
20 normal dumpster operation? Why not resort to a normal
21 dumpster operation? Because GE had a buyer which it
22 reasonably believed was using and buying more.

23 THE COURT: GE did landfill scrap Pyranol.
24 Why would it do that? The Hudson Falls plant -- I
25 don't know the other plant, but I know the location of

1 the Hudson Falls plant because I drove by it two weeks
2 ago, as their witness described to me. It's right
3 next to the river. If they wanted to, they could have
4 poured it in. Why did they pay to landfill it
5 instead? We don't know the answer to that. I don't
6 know that I need the answer, but certainly a plausible
7 answer is GE was becoming more environmentally
8 conscious, and by the 70s it's reasonable to assume
9 that GE, because people were starting to complain in
10 the 70s about PCB, didn't want to be seen as a bad
11 neighbor in pouring thousands of gallons of chemicals
12 into the river. So it stopped doing that but it paid
13 people after that to landfill it and it gave it away
14 to others. If it had a use for it where it could sell
15 it, it would have sold it.

16 MR. BIAGETTI: And in the 50s and 60s of
17 course, it did, and you might draw the inference that
18 what it was selling to Fletcher was a Racicot, Hooper,
19 Whitney of a higher quality. Why? Because of the
20 second column here, what Fletcher picked up. This is
21 the evidence of what Fletcher actually picked up and
22 was using or selling. Hooper, real Pyranol was thick,
23 heavy. That's the stuff that he says they got in that
24 first shipment. Remember? 1953 he sold it to several
25 customers, Hooper said. When they ran out of

1 plasticizer at the factory, Hooper said Fletcher said,
2 go out back, use that stuff, and that's what they did.
3 He used so much of it he wanted to come back for more
4 from GE and he bought from Sprague and Aerovox.

5 THE COURT: I'm not buying, used so much of
6 it. It's a 5 to 7 percent additive to a batch of very
7 limited quality of rubberized paints and roof coating
8 that Fletcher made infrequently compared to his other
9 painting businesses, and I don't believe they used
10 much of it. They used some, but I don't believe the
11 evidence suggests they used much of it at the site.

12 MR. BIAGETTI: Fair enough. The undisputed
13 evidence is that he came back for more to GE, and he
14 bought from Sprague and Aerovox at a higher price
15 during that period.

16 THE COURT: Do we know what they paid Sprague
17 and Aerovox for scrap Aroclor?

18 MR. BIAGETTI: I don't know exactly. I
19 thought there might have been -- but it was more. So
20 that's the heavy thick stuff. I would submit to you
21 that's the stuff Fletcher is talking about even in his
22 posturing letter about the Metevier years. That was
23 the right material -- the stuff that he says Metevier
24 was careful that Fletcher got, and to the extent
25 that -- and this is a stipulation, as well, Judge, in

1 the case. Metevier did not give for free loads.
2 Metevier gave additional amounts, per the stipulation,
3 to make up for the thinner loads. Again, Fletcher was
4 telling Metevier half truths. It's too thin for me to
5 use.

6 THE COURT: When I said free, that's what I
7 meant.

8 MR. BIAGETTI: Thank you.

9 THE COURT: He would give free barrels
10 because that's what that is. When you give extra
11 barrels on a load for which you do not charge, you're
12 giving free barrels to make it up.

13 MR. BIAGETTI: You heard Clark. This was a
14 single exceptional valued customer. They made
15 concessions to cultivate the continued demand by
16 Fletcher.

17 THE COURT: You're overstating. I mean GE
18 wouldn't have been in business if this were -- are
19 what they would call one of their prime valued
20 customers. This was a scrapper who was taking away
21 scrap Pyranol. GE was a very profitable, very
22 successful capacitor maker on an international scale.
23 To call Fletcher a preferred customer for that kind of
24 business is a big stretch.

25 MR. BIAGETTI: GE was a profit seeker and it

1 was making pure profit now on something that in the
2 past it had to dispose of. A pure profit seeking
3 motive, and everything they did was consistent with
4 that.

5 Now we get to the thinner Pyranol that had
6 things mixed in it. Okay. So now we're talking
7 about, oh, boy, this is the cigarette butts, the soda
8 cans. What are we talking about? Whitney tells us --
9 and I believe it was in response to questions from you
10 about the filtering process -- all of the barrels go
11 into the big tank. Remember, they cut it in half and
12 they poured it in. They pump it because it's thick.
13 They pump it through these filters. I think he said
14 sometimes it took overnight.

15 THE COURT: They also mixed and pumped.

16 MR. BIAGETTI: They mixed and pumped.

17 THE COURT: That's a partial answer to the
18 varying quality because they tried to homogenize the
19 quality by mixing and filtering.

20 MR. BIAGETTI: Yes, and what comes out?

21 What's left? Whitney recalled it. Black specks.

22 That's it. No gloves. No shoes. No soda cans.

23 Black specks. No evidence any of that was hazardous.

24 That's what came out. So that's what we know about

25 what Fletcher picked up.

1 THE COURT: I think the soda cans and gloves
2 and cigarette butts argument is a little bit strained.
3 That stuff might have found its way in there. That
4 wasn't the problem with the Pyranol. That could have
5 been filtered out, I suspect. The problem is not
6 that. The problem is the dirt, the oil residues, the
7 mineral oil, the TCE, the metal contaminants. All
8 those things. I don't know if you've ever taken apart
9 a hydraulic pump or seen a TCE still or seen a
10 chemical tank that has to be cleaned out periodically.
11 If you ever did, you would know, it's not like -- I
12 used to do TCE cases in Silicone Valley, and I've been
13 in clean rooms. It's not like a clean room that
14 they're operating here. This is a manufacturing
15 operation. I'm not saying GE did it in any kind of
16 substandard way, but it's a very dirty business but
17 it's not -- the problem is not that there's soda cans
18 floating in the Pyranol. I agree with you on that.

19 MR. BIAGETTI: And what Fletcher got, Judge,
20 based on this evidence from the Fletcher employees, is
21 probative of what Fletcher was picking up at GE, which
22 is probative of what GE saw Fletcher picking up, which
23 is probative of GE's knowledge of whether or not it
24 was -- to use Ms. Fiske's word -- inevitable that
25 there would be a disposal by Fletcher.

1 Lastly, what Fletcher did with it, okay? We
2 know that the real heavy stuff he uses that substitute
3 and sold it to several customers. I mentioned that.
4 The thinner stuff -- we know from Hooper -- he sold as
5 is -- or as Whitney pointed out, after some blending
6 and filtering he sold at a cheaper price but he sold
7 it. We know that there were these other drums. He
8 said there was a mixture in a few drums of something
9 that not even the chemists -- not even the paint
10 chemists at Fletcher knew what it was, and those were
11 set aside.

12 They were asked on direct by the government,
13 do you know what happened to those drums, and they
14 answered no. So no evidence that they were disposed
15 of, but you may infer that since the Fletcher Paint
16 chemists didn't know what it was, it wasn't Pyranol.
17 It wasn't TCE.

18 THE COURT: Do you have a theory as to why it
19 would be relevant for Fletcher to know the specific
20 gravity of the drum of scrap Pyranol?

21 MR. BIAGETTI: My theory would be customer
22 satisfaction for Webtex.

23 THE COURT: If you have something that's a
24 mixture -- some things that are heavier than Pyranol,
25 denser than Pyranol, some things that are less dense

1 than Pyranol and Pyranol -- what does the specific
2 gravity of the drum tell you about the contents? It
3 doesn't necessarily tell you is this pure Pyranol? Is
4 this a mixture of Pyranol and TCE and water? Pyranol,
5 mineral oil, TCE and water? It doesn't tell you. No
6 one has been able to answer that question for me, and
7 I wondered if you had one, which is why is he
8 bothering to test this thing for specific gravity? I
9 guess if he got one that was close to the specific
10 gravity of Pyranol, he's going to draw a beneficial
11 inference that it's probably mostly Pyranol?

12 MR. BIAGETTI: I don't know the answer.

13 Hooper is no chemist. All Hooper knows is that he's
14 doing some testing. There are chemists, Bishop and
15 McNulty, who, as Mr. Racicot testified, are using
16 syringes and doing other kinds of testing, and you may
17 infer that was to please -- first of all, to make sure
18 some of it -- to get to your point about the risk --
19 is this a good enough load for Fletcher to use in his
20 paint, roof coating, pool paint, rubber-based paint,
21 or is it the thinner stuff that he can sell to his
22 customer, Webster?

23 THE COURT: Let's spend a minute on that
24 because I thought that was an important point. You
25 don't seem to think much of this, but paints are made

1 from -- it's chemistry. They're made from formulas,
2 and there was interesting testimony -- I can't recall
3 which of the experts it was about -- about the nature
4 of Aroclor and how it binds with various resins and
5 how it is effective or not. And so I'm -- but the
6 problem I'm having is paint is made from a recipe,
7 essentially. Aroclor comprises a small part of the
8 recipe in those paints that call for it, 5 percent or
9 less. The vast bulk of the formula are other things,
10 the cost to the manufacturer. If you don't know
11 what's in the Aroclor substitute that you're using,
12 for example if it's half TCE and half Aroclor and you
13 put in the amount called for as if it were full
14 Aroclor, you won't get the quality of the plasticizer
15 effect to the extent you need to. So that batch will
16 end up being defective simply because half of it is
17 TCE and half of it is Aroclor.

18 If you have other contaminants in there, it
19 might interfere with the ability of the mixture to mix
20 appropriately. It might affect the drying time for
21 the formula which, depending upon what you're using it
22 for, is very important.

23 You can't deliver a product to specification
24 if you don't know what you're putting in the product.
25 That seems to be problematic when what you're trying

1 to do is save a little on a 5 percent constituent and
2 running at risk the whole load. What do you have to
3 say about that?

4 MR. BIAGETTI: First of all, Judge, you're
5 wrestling with all of this why? The folks at the
6 capacitor crew at GE Hudson Falls don't know a darn
7 thing about paint chemistry. You're wrestling with it
8 because what Fletcher could do with it is probative of
9 what GE knew about what Fletcher was doing, first of
10 all, and the evidence is quite clear that while
11 Fletcher was using some of the thick stuff, the really
12 thick stuff -- Hooper said he liked that -- as a
13 fairly safe Aroclor substitute -- remember the first
14 thing he does in '53 to '56 is he tries it as an
15 Aroclor substitute, and we may infer it works because
16 he consumes or resells all of it. So he knows the
17 good stuff is going to work and he's got McNulty and
18 Bishop, his chemists, to confirm that, however they
19 do. He's got no risk there.

20 All of the rest of it, I submit the evidence
21 shows, he's selling to Webster, and there he's triple
22 dipping. First he's got somebody who will take the
23 thinner stuff for roof coatings. Is it usable for
24 that purpose? The government's expert, Portfolio,
25 tells us, absolutely. So number one, he's making

1 money on the stuff that he can't use in his own paint.
2 Two, he's going back to Metevier and to Clark and he's
3 telling them, I can't use this. It's too thin. They
4 know some of it is thin. They think he's using it in
5 paint. They cultivate and provide a price concession.
6 He buys at a lower price and, three, we have the
7 testimony --

8 THE COURT: You're saying GE thought they
9 could use it all, but they made concessions to him
10 anyways. They knew that they were being scammed, and
11 yet they just allowed themselves to be scammed.

12 MR. BIAGETTI: If I said I knew they were
13 being scammed, I didn't mean to. Quite the opposite.

14 THE COURT: So GE thought, in fact, when
15 Metevier told them, I've got scrap Pyranol that I
16 can't use, that they understood that he couldn't use
17 it and that's why they made him concessions?

18 MR. BIAGETTI: When Fletcher gave Metevier
19 the understanding that some of it Fletcher could not
20 use, that may -- first of all, that's hearsay.

21 THE COURT: Why isn't that an admission that
22 the barrels that were provided by GE to Fletcher
23 were -- at least some of them were being provided for
24 disposal because GE knew that Fletcher couldn't use
25 those barrels?

1 MR. BIAGETTI: Because Fletcher keeps coming
2 back for more. He makes 70 trips, Judge, according to
3 the documents. Not once on the return trip to Hudson
4 does he bring back any that he, in fact, cannot use.
5 Not once. He's using or selling every drop --

6 THE COURT: Because GE would never take back
7 these barrels because it was trying to dispose of it.

8 MR. BIAGETTI: It never came up.

9 THE COURT: In the simple,
10 commonly-understood sense of, get rid of it, right?
11 They didn't think that these barrels would be valuable
12 to GE. They wanted to get rid of it to the point that
13 they were willing to forfeit their \$1.25 deposit that
14 they would make on barrels of Aroclor that they got
15 from Monsanto. Because Monsanto would charge them --
16 my understanding is -- a \$1.25 deposit per barrel. GE
17 is willing to ship it out and lose the \$1.25 per
18 barrel because it doesn't want this stuff back because
19 they know they can't use it and they don't want the
20 scrap yard to fill up with scrap Pyranol.

21 MR. BIAGETTI: The evidence is Abbe, Clark,
22 the only thing they knew for sure Fletcher was doing
23 was using it in paint. They had no idea how much.

24 Metevier says, when you get right down to it,
25 that I understood from Fletcher that some of it was

1 thin, give me some more. We have a stipulation in the
2 case that that's precisely what GE did, additional
3 loads to make up for it. And finally, again, we have
4 the testimony of -- I believe it was Racicot or
5 Whitney -- that Fletcher was then taking the Webster
6 paint, the roof coating that was being made with the
7 thinner stuff, slapping a Fletcher Paint label on it
8 and selling it at Fletcher stores. He's making money
9 three different ways on the thinner stuff.

10 The last thing that we know that Hooper and
11 Whitney recalled that Fletcher got was some barrels
12 that had TCE and he said -- you know, the usual
13 Fletcher, always the entrepreneur. He sold those.
14 That was valuable stuff, and he sold it. So when we
15 look at what Fletcher actually picked up --

16 THE COURT: Where's the reference to that he
17 was selling the barrels of TCE he got from --

18 MR. BIAGETTI: I'll have it for you in a
19 second, Judge. I don't have it at my fingertips.

20 THE COURT: Okay. It's up now. Whose
21 testimony is that?

22 MR. BIAGETTI: That was Hooper, I believe.

23 THE COURT: Hooper?

24 MR. BIAGETTI: Correct. Hooper at 254.

25 THE COURT: Okay.

1 MR. BIAGETTI: So that's what was actually
2 happening to the scrap Pyranol that Fletcher was
3 taking and, to a certain extent, reselling.

4 Finally, we had some testimony about some
5 stuff that was set aside -- placed to one side. And
6 again, they were asked directly on examination whether
7 they knew what was done with that. They said they did
8 not --

9 THE COURT: Who is Kamieniki?

10 MR. BIAGETTI: Kamieniki was a businessman
11 who -- the testimony is from Hooper -- came by
12 sometime later -- sometime after 1968 and took, quote,
13 a lot of those barrels that had been set aside.

14 THE COURT: Did either of you ever find him,
15 track him down, know what he did with the barrels or
16 anything like that?

17 MS. FISKE: Your Honor, our investigator
18 located his widow, and there is testimony -- I'm not
19 sure if it's in the record or not.

20 THE COURT: I won't consider it. I was just
21 curious about whether you followed up to see what
22 happened to him.

23 MS. FISKE: He ran various -- a garden shop
24 known as The Junk Man. He came and picked up the
25 stuff. There's no evidence in the record that he paid

1 the man, as opposed to maybe Fletcher paying him. It
2 was sometime in the early 80s.

3 THE COURT: And no evidence as to what he did
4 with it?

5 MS. FISKE: We have not been able to
6 determine that from conversations with his widow.

7 THE COURT: Okay. There's nothing in the
8 record on that and I don't want to --

9 MR. BIAGETTI: There was a question asked
10 whether anybody knew -- of one of the witnesses --
11 whether they knew what Kamieniki's business was, and
12 the answer was no.

13 The point is this. Again, back to no discard
14 by Fletcher. Fletcher -- once Webster dried up as a
15 customer, Fletcher could have taken the barrels and
16 poured out the contents, sold the empty drums for a
17 buck fifty. He doesn't do it. He stacks them on
18 clean pallets. He checks them for leaks. He has his
19 crew -- Hooper says, we were supposed to check them.
20 He stores them. He tries to sell them during the
21 plasticizer shortage of 1974 as a substitute for
22 plasticizer. He sells some to Kamieniki.

23 THE COURT: When was it banned for use as a
24 plasticizer?

25 MS. FISKE: 1978.

1 THE COURT: 1978.

2 MR. BIAGETTI: That's in the Shifrin report.

3 But again, in terms of all the evidence of how
4 Fletcher valued this stuff, he could have poured it
5 out, sold the drums, did not. Stored them, stacked
6 them, fixed them, tried to sell them. No
7 preponderance of evidence of any discard by Fletcher.

8 Was there eventually a release 20 years
9 later? Of course. Is there any evidence that any of
10 that was from drums of GE's Pyranol? None, your
11 Honor. We know that Fletcher stacked these along with
12 drums from Aerovox, from Sprague, his own resins, his
13 own linseed oil, et cetera, and there's no evidence
14 that anything that was released was hazardous.

15 THE COURT: I don't know anything about the
16 site work done here -- and this may not be in the
17 record. Are there any PCBs in the groundwater?

18 MS. FISKE: Yes.

19 MR. FLYNN: Yes.

20 THE COURT: I assume that's why you're going
21 after these guys, right?

22 MR. FLYNN: Yes. There's PCBs in the
23 groundwater, in the soil, and we have a stipulation
24 that shows it's 400, but half of the drums that were
25 tested contain PCBs. Exhibit 55 of the United States

1 exhibit list.

2 MR. BIAGETTI: Judge, I just want to touch on
3 two more points, if I may, about GE's reason to know
4 what was going on. First, we have GE's -- what GE saw
5 during what we're going to call the Metevier years,
6 and we tried to put together for you here -- can we
7 move it to the left a little bit -- a timeline where
8 we have the pick-ups beginning -- if we could move to
9 the left a little bit, yeah, there it is. That first
10 shipment we talk about in 1953, it's more than a
11 hundred drums and it's all either used or sold. He
12 comes back for more.

13 By '55 the sales to Webster begin, and now
14 the pick-ups by Fletcher begin. This is what GE sees,
15 a pick-up in '56 of 20 drums; 17 pick-ups in '57; 12,
16 11, 12. There are complaints during this time,
17 according to Metevier, only about two things. One,
18 short loads. You didn't give me enough. You didn't
19 sell me enough. Or two, stuff is so thin that I can't
20 use it, and so additional makeup loads are provided.
21 That's our stipulation that you see down here, and so
22 the pick-ups continue throughout the Metevier period.
23 There is never a return of a barrel. Hooper says that
24 the quality never changed during this period.
25 Fletcher says that this was the period in which GE was

1 careful to give us the right material.

2 And the only other point I believe we have
3 during the Metevier years is the tour, when Metevier
4 goes to Fletcher Paint. You heard the questioning on
5 that subject. All Metevier could see at that time was
6 a bustling paint operation. He couldn't see the
7 stockpile of drums, to the extent it existed, because
8 the walls were too high and he couldn't see it when he
9 was in Mr. Fletcher's office. But what if he had?
10 What if he had? He would have simply seen Fletcher
11 storing on pallets his -- maintaining his inventory.
12 He would not have seen discard. Again, no willful
13 blindness. To the extent that they did ask, they were
14 told it was being used in paint, we have that
15 testimony. And even if they had seen, all they would
16 have seen was storage and care, not discard.

17 After the Metevier years -- can we move it
18 over? That's perfect. Thank you. We have Metevier
19 retiring and we have the testimony that Varnum came
20 aboard and said, basically, if you haul it, you bought
21 it, and so the testing at GE begins.

22 What did Hooper say? They saw the testing --
23 that GE's crew on the dock and Mr. Varnum saw the
24 testing with the beaker and the hydrometer, saw the
25 selection and rejection by Fletcher's crew. And

1 again, at the risk of bringing it up for the third
2 time --
3 THE COURT: Doesn't that show that GE
4 understood that not all of the waste Pyranol it
5 produced was of acceptable quality for Fletcher?
6 Therefore, in years where barrels were being shipped
7 without hydrometer testing, either before the time
8 when they were doing it or after when they were
9 getting shipments by a contract shipper, that GE well
10 understood that not all of the Pyranol was usable for
11 Fletcher?

12 MR. BIAGETTI: I don't think so, Judge,
13 because the quality stayed the same, Hooper tells us
14 that, and the pick-ups continue. If you look at '66
15 and '67, even in the years when, according to Hooper
16 and Whitney, it is possible that there were a couple
17 of independent contractor shipments by a guy hired by
18 Fletcher, that's the state of evidence --

19 THE COURT: The pick-ups went on during the
20 Metevier years because Metevier gave free barrels in
21 compensation for bad barrels. They went on in the
22 Varnum years because Fletcher was able to reject
23 on-site the barrels that it didn't want. And they
24 went on in the contractor years because Fletcher was
25 getting the barrels without paying for them because he

1 just refused to pay the invoices until they started to
2 go after him. Then he complained and he ended up
3 getting them for free. So that's why it went on even
4 though during the Metevier and pre-Metevier years they
5 knew they were getting bad barrels, and in the
6 post-Varnum years they knew they had gotten bad
7 barrels because they didn't have to pay for any of
8 them. That's why -- that's I guess why you and I are
9 seeing this case in very different ways.

10 MR. BIAGETTI: You are focusing a lot on what
11 ends up being the Fletcher letter. In the Metevier
12 years we know we have some complaints about short
13 loads, about thin stuff and we have some make-up
14 barrels being shipped. That, respectfully, Judge,
15 does not equate to evidence that Fletcher was not
16 using what he had. He was -- we know he was using the
17 thick stuff. The rest he was reselling. He wasn't
18 telling GE about the reselling. GE only knew about
19 the use.

20 THE COURT: He could have been filtering and
21 blending it and using it all, as you're suggesting.
22 That's one possible argument I understand you to be
23 making on that. He could have been selling it all as
24 an extender and lying to Metevier and lying to Clark
25 or whoever he wrote the letter to.

1 MR. BIAGETTI: Clark.

2 THE COURT: That's another possibility. Or
3 it could be as he was representing, which is, I can't
4 use a lot of this stuff. I'm not going to give it
5 back to you. I'll keep it here even though I can't
6 use it, but I want allowances made for the fact that I
7 can't use it. Those are the three possibilities. You
8 discount the last one, but it seemed to focus on the
9 other two.

10 MR. BIAGETTI: Well, I discount the last one
11 to the extent that all of his behavior after that is
12 inconsistent with this notion that he can't use. He
13 keeps buying the paint. During the Metevier years
14 he's buying and paying for. He's never returning any.
15 During the post-Metevier years the testing is going
16 on. He's taking what he thinks are good barrels, and
17 then we come to the Clark letter, and so I want to get
18 to that next, if we can.

19 THE COURT: I've got to give my reporter a
20 rest soon. Are you getting close to being done?

21 MR. BIAGETTI: Can I have ten minutes?

22 THE COURT: Can my reporter go another ten
23 minutes? She says yes. Ten minutes, and then we'll
24 take a break.

25 MR. BIAGETTI: Unless you want to take the

1 break now.

2 THE COURT: No. I'm fine.

3 MR. BIAGETTI: First of all, there's things
4 that we know that he even in this letter concedes,
5 we've had good relations with your company. Metevier
6 used to be careful that the drums that were shipped
7 were reasonably clean. He took care that he did not
8 receive drums that were only partially filled or had a
9 lot of water. When our truck was picking up, folks
10 were careful to give us the right material. We have
11 been through that. Now we get to his contentions --
12 and, again, remember, Clark's testimony is I had a
13 conversation with him in January. He never -- and I'm
14 trying to cultivate -- I'm trying to encourage more
15 buying. I know that he hasn't paid. I mention that
16 in the call but at the end. That's in January.
17 Within a couple of weeks for the first time ever
18 during the Clark years there's a complaint, and here's
19 what it is. The first contention: About two or three
20 years ago something happened -- or shall we say a
21 variety of things happened. Well, we know, first of
22 all, Hooper says nothing happened. Quality stayed the
23 same throughout, and we know that during this period
24 Fletcher made 26 more pick-ups of 2,500 drums without
25 a complaint. Without a peep.

1 THE COURT: Go on.

2 MR. BIAGETTI: Thank you. You put the
3 Pyranol in badly contaminated drums containing coal
4 tar emulsion. Well, that's not what Murray or
5 Dashinaw are saying. They saw the drums and said they
6 were new. Mumblo said they were new. Clark recalls
7 that they were new.

8 THE COURT: I don't know that there's any
9 evidence that coal tar emulsion was ever used. I had
10 a lot of coal tar cases, too, and it's generally a
11 residue of coal gasification, and it's not something
12 that would be a product or a by-product of a capacitor
13 manufacturer so I don't know what that is.

14 MR. BIAGETTI: Nor are we. And remember,
15 Fletcher recognizes in this letter through the whole
16 thing, unknown to me this has been going on for some
17 time. So he is, at best, guessing and wrong and, at
18 worst, posturing. One more. You have shipped drums
19 one-quarter and one-half full. Well, we know, again,
20 after the Metevier years there was testing that went
21 on at GE and only drums that were selected by Hooper
22 came back. Clark recalls no previous complaints on
23 this subject either.

24 Next. And here we have this other trucker.
25 Again, Hooper and Whitney say, it was only Hooper who

1 did the pick-ups or a couple of times Fletcher may
2 have hired Ross or Fletcher may have hired Madsen. No
3 evidence that there was any hauling by GE. No
4 evidence that there was any billing of 150 bucks a
5 load by GE or payment by Fletcher of \$150 a --

6 THE COURT: And Fletcher doesn't contend
7 that. His letter contends he paid for it all.

8 MR. BIAGETTI: Right. Yes, he does. So
9 we have to believe during that time period, when those
10 loads were coming -- again, it was 70 drums a load.
11 They came 17 times in 1966 and 1967. They were
12 garbage, according to savvy businessman Fletcher, and
13 he accepted every single one of them without a peep.

14 GE reasonably disbelieved this letter. How
15 do we know? One, Clark and Abbe say it; but two, they
16 do the Monsanto test. Why test material if you're
17 laying down -- if your state of mind is, this is
18 garbage, we found this out, that's the end of that.

19 No. They didn't believe it. They challenged its
20 validity. That's why they do -- the very fact of the
21 Monsanto test is evidence of GE's state of mind that
22 they did not believe what Fletcher was saying in this
23 letter, or to use Clark's words, that the stuff was
24 anywhere near as bad as Fletcher said. We believed he
25 could continue to use it.

1 Abbe and Clark then decide on the write-off.
2 Why? They don't want to spend GE's money -- GE the
3 profit maximizer -- on sending a chemist for a week.
4 And most importantly, they want to keep Mr. Fletcher
5 happy. They want to cultivate him. They want him to
6 resume buying. Abbe believes that it worked. His
7 testimony is that he did continue to buy. Hooper
8 says, I continued to make pick-ups up until my
9 gallbladder operation in 1970. So that was GE's state
10 of mind. We don't believe it. We think he'll
11 continue to buy and use. Let's cultivate and get him
12 to do it. And that's what they did.

13 So you don't get to, respectfully, any
14 inference of an intent by GE to arrange for a disposal
15 here unless you make several ambitious inferences.
16 There's no direct evidence of the state of mind of GE
17 knowing that Fletcher was going to dispose. They
18 thought he was using it in paint.

19 There's no evidence that Fletcher did
20 discard. He cared for everything. He put it on
21 pallets. He tried to sell it. He never dumped out
22 the contents and sold those drums for a buck and a
23 quarter. He was storing his inventory because it had
24 value to him.

25 You would have to find, Judge, or infer in

1 order to find circumstances here of intent to arrange
2 for disposal would be at least this: That the testing
3 did indeed end sometime before November of 1967. That
4 those 17 loads that came afterwards came without any
5 scrutiny at all, but we know that the quality didn't
6 change at that time. We know that Hooper continued to
7 make the pick-ups and Hooper was on the stand. The
8 government never asked him, did you continue to do the
9 testing after? Because his recollection was that he
10 did continue to make pick-ups, that Varnum continued
11 to work there -- that was Hooper's recollection --
12 that there were no other people that did it and that
13 the testing continued.

14 You would have to find that of those drums
15 that came in those two years of an independent hauler
16 or two, that the quality in them declined
17 dramatically, so dramatically that it was actually
18 below what the Monsanto test reported. Namely, up to
19 22 percent because we know from the government's
20 expert, Portfolio, and our experts, that anything even
21 as described by Monsanto was usable in roof coating,
22 which Fletcher made, and was usable in the products
23 that Fletcher was selling to Webster.

24 So there would be no stockpiling after that
25 unless the stuff in there had declined in quality so

1 dramatically that it was even worse than what Monsanto
2 had reported. And again, Fletcher never makes a peep
3 during this time about uselessness.

4 THE COURT: If you were to tick off the five
5 strongest points to suggest in your view that this
6 arrangement between GE and Fletcher was an arrangement
7 for sale of Pyranol that was to be used rather than
8 disposed of, I think one of them would be Fletcher
9 paid for the product. Another would be Fletcher told
10 various people at GE that he was using it as a
11 plasticizer in paints.

12 MR. BIAGETTI: Yes.

13 THE COURT: Give me the other three points
14 that you think support your interpretation. Not
15 arguments that they can't prove that, but what
16 evidence do you have that -- affirmative evidence that
17 that is what the arrangement was?

18 MR. BIAGETTI: What GE saw of Fletcher's
19 conduct at the -- both in doing the testing and
20 selecting and rejecting at the GE dock, and before
21 that seeing that Fletcher was only complaining about
22 short loads, wanting more. That's consistent with
23 knowledge of putting it to a useful purpose. The
24 expert --

25 THE COURT: So that he bought and that he

1 continued to buy over a multi-year period.

2 MR. BIAGETTI: Yes.

3 THE COURT: If he were just experimenting and
4 thought he might be able to use it, he might have
5 bought one load, but you wouldn't see him coming back
6 buying more loads. So I think you would say not only
7 did he pay for it, but that he paid for it on multiple
8 occasions over a multiple-year period suggests use.

9 MR. BIAGETTI: Yeah, and that he kept
10 bargaining. He complained when he didn't get enough.
11 That he paid two prices. He was pushing as hard as he
12 could to drive the best bargain because, he had -- at
13 least in his eyes he had a use. I would add the
14 unanimity among the experts that this was indeed
15 useful and usable for the purposes that Fletcher was
16 using them for and that Fletcher, in turn, was making
17 money on. It was not inevitable that there was going
18 to be any discard here because it was all usable. It
19 was all usable.

20 And finally, I would say the way that GE
21 treated the product, okay? It segregated it on the
22 dock. It labeled it. It held it there. It didn't
23 dump it into the Hudson River. It didn't sell the
24 empty drums. It held it for Fletcher to buy and
25 cultivated Fletcher whenever it could to continue to

1 buy more.

2 Lastly, Judge, to the extent that you decide
3 that there was something more than a release here,
4 that there was a disposal --

5 THE COURT: I'm not going to decide today
6 whether there was a disposal, okay? That was not what
7 I was asked to do. I'm not doing that.

8 MR. BIAGETTI: But you would have to find
9 that this was something more than a mere abandonment
10 of drums after Fletcher dies in 1983. Up until that
11 time he cared for them, put them on a pallet, checked
12 them for leaks. Sometime thereafter there was
13 leaking. There's no evidence that it's GE's drums
14 that leak, and there's no evidence that Fletcher had
15 that or contemplated that or had it in mind. The
16 evidence is quite the opposite.

17 So there again, Judge, there's no evidence
18 that either GE or Fletcher was using any of this as,
19 to use the statutory term that your Honor was talking
20 about before, a solid waste. This stuff was being
21 used, as far as GE knew, in a manufacturing process by
22 its one valued client as to whom it was making a
23 hundred percent profit on, essentially, and that was
24 Fletcher. There was no discard. There was no
25 recycling by Fletcher of that product, and there was

1 no knowledge by GE that that's what Fletcher was doing
2 with it.

3 All GE saw was Fletcher buying, bargaining,
4 complaining when he didn't get enough and coming back
5 for more, and we believe that that proof establishes
6 facts from which you must infer that there was no
7 knowledge on GE's part at the time, '53 to '68, that
8 this was being -- that it was substantially certain
9 that Fletcher was going to take this stuff and dispose
10 of it. May I have one moment?

11 THE COURT: Yes.

12 MR. BIAGETTI: Thank you for your time.

13 THE COURT: Thank you. I want to commend
14 counsel for both sides. I think you've --
15 particularly GE has tried to present every single fact
16 that could possibly be presented to support its side
17 of the case, and I respect that. I think on a couple
18 of occasions in your oral argument today you reached a
19 little further than I would have in trying to ask for
20 further inferences to be drawn, but I do respect the
21 fact that you have zealously represented your client
22 and tried to bring to my attention every single fact
23 that could possibly support your position that the
24 government has not proved that there was an
25 arrangement for disposal here. I'm going to take a

1 break and then I'll come back and give you a decision
2 in ten or fifteen minutes.

3 (Recess)

4 THE COURT: The sole issue I'm going to
5 decide today is whether GE "otherwise arranged for
6 disposal" of a hazardous substance when it arranged
7 with Mr. Fletcher to transfer waste Pyranol from GE to
8 Mr. Fletcher and his businesses.

9 As I've previously explained, the government
10 has the burden of proving by a preponderance of the
11 evidence that GE did otherwise arrange for disposal of
12 the scrap Pyranol. I've also explained that it's my
13 interpretation of the phrase "otherwise arranged for
14 disposal", that the phrase means -- that the phrase
15 means entered into an arrangement in which disposal
16 was the desired outcome; that is, the objective and
17 cases in which the person who arranges for disposal
18 knows that disposal is substantially certain to result
19 from the arrangement.

20 I believe that I should consider the totality
21 of relevant circumstances in making this determination
22 and not treat any one piece of evidence as
23 dispositive. Using this test I find by a
24 preponderance of the evidence that the government has
25 proved in this case that GE otherwise arranged for the

1 disposal of waste Pyranol. Let me explain my
2 reasoning.

3 I think we need to examine several matters in
4 order to try to resolve this dispute. We need to ask
5 ourselves: What was in the drums of waste Pyranol
6 that GE transferred to Mr. Fletcher? We need to ask
7 ourselves: What did GE do with the scrap Pyranol that
8 it did not transfer to Mr. Fletcher?

9 We need to ask ourselves: What did GE
10 understand about Mr. Fletcher's business when it
11 entered into the arrangement with him? We need to
12 understand what was GE's understanding of the
13 potential uses of waste Pyranol at the time it entered
14 into the arrangement, and we need to understand the
15 precise contours of the arrangement between GE and Mr.
16 Fletcher as it evolved over time.

17 I want to start with asking: What is it that
18 was in the barrels of scrap Pyranol that were
19 transferred to Fletcher? I think we know that scrap
20 Pyranol came from several sources within the GE
21 manufacturing process. GE purchased Aroclors from
22 Monsanto. It then filtered those Aroclors and added
23 things to them. What they added changed over time as
24 the composition of the Pyranol changed to meet
25 changing specifications. GE would filter the Aroclors

1 with fuller's earth and add things to it to make
2 Pyranol. At one time, for example, as much as 25
3 percent of Pyranol would be comprised of a different
4 compound, PCB, and there were other additives used at
5 different times during the process of producing
6 Pyranol.

7 Pyranol was used by GE primarily to -- I'm
8 going to use the term -- infuse capacitors. It was
9 used as a dielectric fluid and it was placed inside
10 the capacitors. During the manufacturing of
11 capacitors, waste Pyranol could be produced in a
12 variety of different ways. There were occasions in
13 which GE was not able to bring a batch of Pyranol up
14 to specification and would have to declare the entire
15 batch a waste product. It would regularly be the case
16 that Pyranol would spill during the manufacturing
17 process and have to be recovered sometimes with Speedy
18 Clean being poured on the spill; other times the spill
19 being collected in other ways. The liquid portions
20 would be treated as scrap Pyranol.

21 Scrap Pyranol would be collected in drip pans
22 that would be placed at various points along the
23 manufacturing process. Scrap Pyranol would be
24 collected from troughs that were cut into the floor.
25 Scrap Pyranol would be recovered after TCE was

1 distilled for reuse. TCE is a degreaser that was used
2 to clean the capacitors during the manufacturing
3 process, and frequently you would find TCE mixed with
4 Pyranol. And when that occurred, the Pyranol would
5 have to be treated as scrap Pyranol.

6 Scrap Pyranol would contain TCE. It would
7 contain water. It would contain mineral oil. It
8 would contain metal. It would contain dirt and debris
9 that would find its way into the drip pans and the
10 troughs and on the floor when spills would occur. It
11 was also produced when capacitors were tested and
12 found to be defective. They would have to be drained
13 and the Pyranol would be treated as scrap Pyranol.

14 Scrap Pyranol was collected in a scrap
15 Pyranol tank in which scrap Pyranol from a variety of
16 sources would be deposited into the tank until it was
17 filled to a sufficient degree that it would be poured
18 off into 55 gallon drums. On other occasions scrap
19 Pyranol would be placed in the drums directly. When a
20 sufficient amount of scrap Pyranol was collected in 55
21 gallon drums, it would be removed to a scrap area and
22 it would be labeled as scrap Pyranol. It would be
23 retained in the scrap area with other kinds of scrap
24 materials.

25 What do we know about the content of that

1 scrap Pyranol? I believe that it varied dramatically
2 in quality from barrel to barrel. When barrels were
3 composed primarily of a batch of Pyranol that didn't
4 meet a specification, it would be relatively
5 uncontaminated. When it came from other sources, it
6 might have much higher degrees of contamination.

7 I forgot to mention another source of scrap
8 Pyranol would be the use in pumps -- they sometimes
9 refer to them as oil pumps -- and those pumps would
10 leak or have to be cleaned and the oil in the pumps
11 would be Pyranol, and that would be scrapped, as well.

12 The 55 gallon drums contained a variety of
13 substances, including Pyranol, and the composition of
14 each barrel would vary from barrel to barrel. We know
15 this both from -- we know it from Mr. Hooper's
16 testimony. We know it from Mr. Fletcher's complaints
17 to Mr. Metevier. We know it from the fact that Mr.
18 Fletcher had to do testing of barrels during the
19 Varnum regime where he was being required to pay for
20 every barrel that he took. We know it from Mr.
21 Fletcher's complaints to GE when he was asked to pay
22 for drums that he hadn't paid for that had been
23 shipped using a private contractor and for which, in
24 my view, no testing at the loading dock had been done
25 as had been with the Varnum barrels, and we know it

1 from the Monsanto test results from the representative
2 sample of drums from the GE scrap area.

3 So we know that it would vary dramatically in
4 its composition and would contain, in some cases, more
5 than 20 percent TCE, would contain water, would
6 contain mineral oil, would contain metals, would
7 contain other substances, would contain dirt and
8 debris. And so we know that the scrap Pyranol was
9 really far, far different from the Aroclor that would
10 be purchased by GE from Monsanto.

11 In fact, although some efforts were made
12 initially or at some point to get Monsanto to reclaim
13 the Pyranol, it was deemed not feasible to do so, and
14 it simply could not in that form have been used as a
15 substitute for Aroclor; certainly as a dielectric
16 fluid or, as I'll explain later, as a plasticizer in
17 paints.

18 What do we know about GE's uses of scrap
19 Pyranol? I believe it's unquestioned in this case
20 that GE viewed scrap Pyranol as a waste. It was a
21 by-product of its manufacturing process. It was
22 something to be gotten rid of by GE. It was not
23 something that GE saw as a profit center -- a way to
24 make money through the sale of a product.

25 We know this because every other use that GE

1 made of scrap Pyranol unquestionably qualifies as a
2 disposal. We know GE dumped it into the river.
3 That's an arrangement for disposal. We know GE
4 landfilled it. That's an arrangement for disposal.
5 We know GE gave it to local communities for use as a
6 dust suppressant, and we know that that's a disposal.
7 There isn't a single instance of GE entering into an
8 arrangement to use scrap Pyranol for anything other
9 than things that would amount to disposal in this
10 record. And the only question is: Did its
11 arrangement with Fletcher amount to something other
12 than an arrangement for disposal? It is highly
13 relevant that all of the other arrangements that GE
14 made with respect to waste Pyranol were arrangements
15 for disposal.

16 Now, what do we know about GE's understanding
17 about what Fletcher did? Fletcher was a small paint
18 manufacturer and chemical scrapper, and GE understood
19 him to be such. A small paint manufacturer and
20 chemical scrapper.

21 I don't believe there's persuasive evidence
22 in the record to suggest that GE knew that Fletcher
23 was using Pyranol, himself, as a dust suppressant,
24 although clearly GE knew that others used scrap
25 Pyranol for that purpose. I don't believe there's

1 persuasive evidence in the record to suggest that GE
2 knew that Fletcher was using it as -- would use it as
3 an herbicide or insecticide, although GE knew that
4 others were using scrap Pyranol for that purpose.

5 I don't believe that there's any evidence in
6 the record to suggest that GE knew that Fletcher was
7 selling scrap Pyranol to anyone else; and certainly no
8 evidence in the record to suggest that GE was aware of
9 sales of scrap Pyranol to Webtex or its predecessor
10 company.

11 I think it is worth at least noting what, in
12 fact, we know about what Fletcher did with the Pyranol
13 at the site, but to me that's less important than what
14 GE understood when it entered into the arrangement
15 with Fletcher. There is evidence -- and finally, I
16 think there is evidence to suggest that GE understood
17 that Fletcher was using at least some of it in a paint
18 manufacturing process as a plasticizer.

19 Now, what, in fact, did we know about what
20 Fletcher used the Pyranol for? Fletcher did use the
21 Pyranol as a plasticizer in a rubber-based pool paint
22 or a cement surface paint and perhaps in some roof
23 coating that he manufactured. These were very small
24 quantities in comparison to Mr. Fletcher's other paint
25 making operations and so I can't precisely identify

1 how much was used, but a very, very small proportion
2 of the more than 3,500 barrels of Pyranol that --
3 scrap Pyranol that Mr. Fletcher obtained from GE were
4 used for these purposes.

5 Scrap Pyranol was sold by Mr. Fletcher to
6 Webtex's predecessor. The precise use to which it was
7 being put is not clear to me, although it may have
8 been used in roofing materials, and there is some
9 evidence to suggest that some quantities were also
10 sold by Fletcher to other customers.

11 I am -- it is my judgment, and I believe the
12 government has proved that only a very small
13 proportion of the very large quantity of Pyranol that
14 was received by Mr. Fletcher was ever used for any of
15 these purposes. The vast majority of it was never
16 used and remained on-site until it was hauled away.

17 What do we know about what Mr. Fletcher
18 actually physically did with the waste Pyranol when it
19 got to his site? We know that some of it was blended
20 and filtered. Light Pyranol was mixed with heavier
21 Pyranol. It was filtered and some of it was used. We
22 know that early on many of the barrels were stored on
23 their side behind what was the Fletcher paint factory.
24 Later, after some fill was added to that site, barrels
25 were stored on pallets and stacked vertically. The

1 barrels were also stored at other locations on that
2 site and another site Mr. Fletcher owned. The other
3 site they were placed on their sides, stacked two,
4 three, four, five on top of each other.

5 Over time -- the quantity of Pyranol at the
6 site would fluctuate somewhat -- but over time it
7 tended to grow rather than diminish, and certainly
8 there were thousands of barrels of waste Pyranol that
9 were at the site. And we do know that Mr. Fletcher
10 purchased scrap Aroclor from two other companies,
11 Aerovox and Sprague, but these were small in
12 comparison to the numbers of scrap Pyranol barrels
13 that he was purchasing from GE.

14 What do we know about the potential uses for
15 scrap Pyranol? Again, I think what's most important
16 here to me is what did GE understand at the time, but
17 since the parties have spent significant effort trying
18 to establish what potential uses for this product
19 were, let me comment on that and make certain findings
20 concerning that subject.

21 Aroclor, which was used to make Pyranol, did
22 have recommended uses as a plasticizer in certain
23 kinds of paint products that called for plasticizers.
24 Where it was used, it was a relatively small
25 constituent of the paint product that was being

1 manufactured. Five percent or less would be the
2 plasticizer.

3 Aroclor was recommended for use as a
4 plasticizer in certain kinds of paint, and there was a
5 market for the use of certain Aroclors as plasticizer
6 in certain kinds of paint. And it's conceivable that
7 the Aroclors that GE was purchasing could also have
8 been used as a plasticizer in certain kinds of paints,
9 although I need to be clear that Monsanto used Aroclor
10 as a trade name that covered a variety of different
11 kinds of products and not every product would be a
12 substitute for every other kind of Aroclor.

13 Indeed, some Aroclors were not even PCBs, as
14 I understand it, but I do think it's at least
15 conceivable that some of the Aroclors that GE
16 purchased did have a use -- alternative use as a
17 plasticizer in certain kinds of paints.

18 It is theoretically possible that scrap
19 Aroclor, at least some of it, could have been used as
20 plasticizer for certain kinds of paint; and as I've
21 already suggested, I think Mr. Fletcher used it for
22 this purpose.

23 It does not appear to me that there was any
24 market at the time for scrap Pyranol -- market of any
25 size for scrap Pyranol as a plasticizer in paints, and

1 it doesn't make to me any economic sense that there
2 would be such a market for the reasons testified by
3 one of the experts; that because it's such a small
4 constituent part of a batch of paint where a
5 plasticizer is called for and because the quality of
6 the scrap Pyranol varied so radically and because
7 paints have to be produced in accordance with specific
8 formulas, it would be simply too risky given the
9 potential limited cost savings of substituting scrap
10 Pyranol for Aroclor to take the risk of ruining an
11 entire batch of paint with that kind of substitute
12 product.

13 I also don't see any evidence that there was
14 any -- there's no evidence in this record to suggest
15 that anybody anywhere in the world, other than Mr.
16 Fletcher was using scrap Pyranol as a plasticizer in
17 paints or selling it for that purpose. Certainly GE
18 was not doing that. There's no evidence that GE did
19 with any of the Aroclor -- scrap Aroclor it had at its
20 facilities. As I explained, it disposed of it in
21 every other case other than, as we're discussing here,
22 the transfers to Mr. Fletcher.

23 GE was a sophisticated company. It had paint
24 making operations. It's reasonable to assume that if
25 scrap Aroclor were a viable substitute for scrap --

1 scrap Pyranol were a viable substitute for Aroclor,
2 that GE would have used it as such or identified a
3 potential market for it as such.

4 Mr. Fletcher was paying such a low price for
5 it that if there were any significant market for the
6 use of scrap Pyranol as a substitute for Aroclor, one
7 would have expected that there would be alternative
8 customers. There's no evidence in the record here
9 that anyone ever approached GE or GE was ever able to
10 find anyone else who was interested in taking this
11 product for use as a plasticizer.

12 So what do we know about the nature of the
13 arrangement between GE and Mr. Fletcher? We know the
14 relationship spanned a number of years. It began in
15 the 50s and continued for a number of years, well into
16 the 60s. We know that the arrangement was -- although
17 the initial transfers appeared to be no charge
18 transfers, that at some point thereafter Mr. Fletcher
19 entered into an arrangement where he agreed to send
20 his men to the facility to take the scrap Pyranol and
21 to pay for the scrap Pyranol. There is evidence to
22 suggest that certain GE employees understood or
23 believed that Mr. Fletcher was using it in paint
24 operations, although there's also testimony to suggest
25 that Mr. Fletcher went to some length to conceal from

1 GE what he was using the product for.

2 I don't think there's any evidence in this
3 record to suggest that GE, when it entered into the
4 arrangement, required Mr. Fletcher to dispose of it.

5 There's no evidence to suggest that GE required Mr.
6 Fletcher to use it as plasticizer in paints. There's
7 no evidence to suggest that GE desired that it be
8 disposed of. That is, that it was the conscious
9 object to release it into the environment.

10 It is absolutely clear to me that GE -- its
11 objective was to be rid of what it believed was a
12 waste product and to do it in the most economically
13 viable way. If it could charge for it, it would. If
14 it could not charge for it, it would find the least
15 expensive acceptable way to dispose of it and it would
16 get rid of it. And so there's no evidence to suggest,
17 though, that it desired that it be released into the
18 environment. Rather, it was indifferent to what
19 happened to it after it got to the Fletcher's
20 property.

21 The arrangement did change somewhat over
22 time. As I suggested initially, it was an
23 arrangement -- excuse me. The initial shipment was a
24 no charge shipment. Then at some point after that Mr.
25 Fletcher agreed to pay for the product. He sent his

1 men to pick up the product or the scrap Pyranol -- I
2 think product is probably a mischaracterization -- to
3 pick up the scrap Pyranol. He would pick it up in a
4 truck that -- his men would pick it up in a truck that
5 had between 18 and 20 -- could carry between 18 and 20
6 barrels at a time, and he would pick it up and the
7 arrangement was, between GE and Fletcher, when GE had
8 scrap Pyranol that it wanted to get rid of and Mr.
9 Fletcher wanted to take the scrap Pyranol, he could
10 arrange to come to the factory and take it and bring
11 it back to his site and pay a price which, after
12 deducting the cost of the used barrels, about four
13 cents a gallon.

14 The arrangement continued for a number of
15 years. Over the course of the life of the
16 arrangement, Mr. Fletcher acquired several thousand
17 barrels. I believe at least 3,500, and probably more
18 than that, based on the parties' stipulation as to the
19 amount of Pyranol that he acquired. When his men
20 would pick it up initially, they would not test it at
21 the site. As I mentioned, the Pyranol varied
22 dramatically in quality, and Mr. Fletcher found that
23 certain barrels were not usable for him. He told Mr.
24 Metevier about that. Mr. Metevier agreed to adjust
25 the arrangement such that certain barrels would be

1 provided at no cost in compensation for the barrels
2 that Mr. Fletcher could not use. No barrels were
3 returned. Mr. Fletcher kept the barrels. GE
4 understood that Mr. Fletcher did not return the
5 barrels even though they were not usable to him.

6 After Mr. Metevier left, Mr. Varnum assumed
7 his responsibilities and Mr. Varnum had a somewhat
8 different arrangement with Mr. Fletcher. He required
9 Mr. Fletcher to pay for every barrel that he took. No
10 more concessions were made.

11 As a result, Mr. Fletcher, because he could
12 not use every barrel of scrap Pyranol -- certainly the
13 barrels were not of sufficient quality to use -- did
14 send his men out at the loading dock to test that, and
15 they took barrels that they thought were useful and
16 rejected barrels they did not find useful, and GE
17 understood that not all of the barrels that it wanted
18 Mr. Fletcher to take were usable by him. It certainly
19 understood that during the time with Mr. Metevier
20 since Mr. Metevier made adjustments to compensate for
21 unusable barrels.

22 After Mr. Varnum there was a period of time
23 in which Mr. Fletcher had a contractor take barrels --
24 a private contractor take barrels from the GE site to
25 Fletcher. Apparently -- and I find his letter to be

1 credible on this point. At some point during the
2 process, the contractor he had found went out of
3 business and GE was able to find a contractor that Mr.
4 Fletcher could retain to transport the barrels.

5 A large number of barrels were transported
6 during this phase of the operation. Mr. Fletcher did
7 not pay for the barrels, although he was billed for
8 them, he did not pay for them for a substantial period
9 of time, and when he was confronted about this, he
10 made clear in a letter that the barrels were not --
11 many of the barrels were not of sufficient quality to
12 be usable by him.

13 He proposed that the parties negotiate a
14 settlement of what is owed, or that they were willing
15 to go through all of the drums with your chemist
16 present and pay for materials such as we used to
17 receive in our agreement over the 12 years prior to
18 the last three years. And he said, we shall expect
19 freight from your place to Milford and we shall ask
20 for freight for returning what is necessary to return
21 to you.

22 No barrels were, in fact, returned as a
23 result of this complaint. GE did not want the barrels
24 back. GE investigated the matter. It had samples --
25 representative samples taken of scrap Pyranol from its

1 own scrap Pyranol area. They were analyzed by
2 Monsanto and that testing tended to substantiate Mr.
3 Fletcher's complaints about the unacceptable quality
4 of the barrels. GE agreed to write off the debt
5 because in comparison to taking the barrels and
6 disposing of them, it was more profitable for GE to
7 write off the debt than to do that.

8 What are we to glean from the nature of this
9 agreement? As I have suggested, the agreement was for
10 Mr. Fletcher to take the barrels away. Take barrels
11 when GE had them and Mr. Fletcher wanted them. The
12 arrangement did not require Mr. Fletcher to use the
13 barrels of scrap Pyranol in any manufacturing process.
14 They did not prohibit Mr. Fletcher from disposing of
15 the barrels.

16 GE did not -- in entering into the
17 arrangement -- desire that the barrels be disposed of.
18 That was not the objective of the arrangement. The
19 objective was to be rid of the barrels. So what does
20 all this evidence tell me about what GE understood
21 when it entered into the arrangement with Mr.
22 Fletcher? What it tells me is that GE understood that
23 while Mr. Fletcher hoped to make productive use of
24 some of the Pyranol, he clearly could not make
25 productive use of much of it. That GE understood when

1 it entered into this relationship that the Pyranol
2 varied so much in quality that it could -- much of it
3 was not usable for any purpose, although some of it
4 could be used by mixing it with better quality
5 Pyranol, still there would be much of it that would
6 not be usable and GE understood this from the
7 beginning.

8 This was a waste product. GE knew it. GE
9 believed that some of it might be able to be used by
10 Mr. Fletcher, but the vast bulk of it would not have
11 been usable by him and would have to be disposed of.

12 I think Mr. Abbe's statement best captures
13 what GE really understood about this matter -- and I
14 don't have the exact quote in front of me, but I think
15 I have it pretty close. We just hope that he was able
16 to use some of it, and the balance of it he could
17 dispose of it. I think that is really what this case
18 is all about, that GE understood from the beginning
19 here, and therefore, in my judgment, GE did otherwise
20 arrange for the disposal of the scrap Pyranol when it
21 entered into its relationship with Mr. Fletcher. And
22 just to emphasize these key points in my mind, Mr.
23 Metevier knew that GE -- excuse me -- that Fletcher
24 could not use all of the scrap Pyranol because Mr.
25 Fletcher told him and Mr. Metevier made adjustments

1 for it. After Mr. Varnum was out at the site --
2 excuse me. During the time Mr. Varnum was in charge,
3 GE knew that Mr. Fletcher could not use all of the
4 scrap Pyranol that it was producing and wanting him to
5 take because it sent out people to test it when they
6 took the samples and they took some and rejected
7 others.

8 And yet in the period that followed GE
9 shipped large quantities of Pyranol that was so
10 severely contaminated that it could not be used even
11 though it understood from the transactions during the
12 Varnum and the Metevier period that not all of this
13 Pyranol was usable by Mr. Fletcher, and I think all of
14 that suggests to me that -- and does prove and --
15 frankly, I don't think it's a particularly difficult
16 case. The evidence is quite clear to me and proves to
17 me quite strongly that GE understood that this was an
18 arrangement with Mr. Fletcher that would result in Mr.
19 Fletcher disposing of substantial quantities of the
20 scrap Pyranol at the site, and he did so.

21 Does anyone need me to make any additional
22 specific findings or rulings? I'm happy to spend as
23 much time as anyone wants me to going over the
24 specific requests for findings and rulings, but I
25 believe I've addressed most of them through my oral

1 decision today.

2 If I have not, though, and people want me to
3 address anything, speak up now. I'll be happy to go
4 through it and tell you what I find or don't find.

5 Does the government want me to do any of that?

6 MR. FLYNN: No, your Honor.

7 THE COURT: Does the defendant want me to do
8 any of that?

9 MR. BIAGETTI: No.

10 THE COURT: Okay. So I think that ends this
11 phase of the case. Why don't I suggest that the
12 parties take, say, 30 days and reassess your
13 positions, and if you aren't able to reach a
14 settlement within 30 days, come back to me and propose
15 a schedule for the completion of any issues that need
16 to be completed in the case. All right?

17 Anything else we need to deal with today?

18 Again, I want to thank the parties. I know that it
19 can be somewhat brutal trying to deal with me when I
20 go through this process. I want you to understand
21 that in my view I only push people that I respect. If
22 I don't respect you, if I don't think you can give me
23 useful information, I just don't talk to you. So to
24 some extent the more I push you, the more respect I
25 have for you and your views. And I think this case

1 was well presented, and I do feel that every possible
2 argument on either side was developed and fully
3 tested, and that's really what you should do in a
4 trial like this when the parties want me to confront
5 and resolve a question like the one that you've
6 presented to me. So I think you've all done good
7 work. I appreciate your work and the help that you've
8 given me.

9 I hope that this decision allows you to move
10 on and find a way to resolve the case, but if you
11 don't, come back and see me in another month and we'll
12 see where we go from there.

13 (Conclusion of hearing at 4:10 p.m.)

14

15 CERTIFICATE

16

17 I, Susan M. Bateman, do hereby certify
18 that the foregoing transcript is a true and accurate
19 transcription of the within proceedings, to the best
20 of my knowledge, skill, ability and belief.

21

22 Submitted: 5-11-09 /s/ Susan M. Bateman
23 SUSAN M. BATEMAN, CSR, RPR, CRR

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